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Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

TRANSATLANTIC SCHIFFAHRTSKONTOR GMBH,

Petitioner,

– against –

SHANGHAI FOREIGN TRADE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "based upon" analysis employed in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), a case involving the first clause of § 1605(a)(2) of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 et seq., or the requirement of a "U.S. Act" is appropriate in an action involving an analysis of the third or "direct effect" clause of § 1605(a)(2) as set forth in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992).

2. Whether an action to enforce a foreign judgment against a foreign sovereign under the FSIA can be "based upon" the requisite "act" under the third clause of 28 U.S.C. § 1605(a)(2) where the party seeking to enforce the judgment obtained it by assignment.

3. Whether a district court has subject matter jurisdiction under the third ("direct effect") clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), on the ground that the action is "based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States" where:

(1) an assignee seeking to enforce foreign default judgments is the real party in interest to the claims giving rise to the judgments;

(2) the acts underlying the foreign judgments occurred outside the United States in connection with commercial contracts entered into outside the United States; and

(3) the acts underlying the foreign judgments caused a failure of monies to be paid to a New York bank contractually designated as the place of payment.

PARTIES TO THE PROCEEDING

All parties in the courts below and in this Court are listed in the caption to this Petition.

Corporate Disclosure Statement
Pursuant to Supreme Court Rule 29.6

Appellee Transatlantic Schiffahrtskontor GmbH ("TASK") has no parent or subsidiary companies and has issued no shares to the public.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Transatlantic Schiffartskontor GmbH ("TASK")[1], plaintiff/appellee below, respectfully petitions this Court for a writ of certiorari to review:

(1) the February 25, 2000 Order of the Second Circuit Court of Appeals reversing the November 16, 1998 decision of the United States District Court for the Southern District of New York which denied the motion of defendant/appellant below, Shanghai Foreign Trade Corporation ("SFTC") to dismiss the action for lack of subject matter jurisdiction (foreign sovereign immunity) and personal jurisdiction; and

(2) the September 6, 2000 Order of the Second Circuit Court of Appeals denying TASK's Petition for Rehearing in connection with the Second Circuit's February 25, 2000 Order.

OPINIONS/ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated February 25, 2000 (reversing the November 16, 1998 Memorandum Opinion of the United States District Court for the Southern District of New York) is reported as *Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384 (2d Cir. 2000) and is reproduced in the Appendix ("A") hereto at A 1-15.

The July 19, 2000 Order of the Court of Appeals denying leave for TASK to file an addendum to its Petition for Rehearing is reproduced at A 46-48.

The September 6, 2000 Order of the Court of Appeals denying the petition of TASK for rehearing is reproduced at A 16-17.

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[1] Throughout the proceedings below and in the documents included in the Appendix hereto, petitioner is referred to both as "TASK" and "Transatlantic" and Shanghai Foreign Trade Corporation is referred to as both "SFTC" and "Shanghai." For the sake of clarity in this petition, petitioner will adopt the Second Circuit's reference to TASK and SFTC, respectively.

The September 20, 2000 Order of the United States District Court for the Southern District of New York (dismissing the action for lack of jurisdiction in accordance with the February 25, 2000 and September 6, 2000 Orders of the Court of Appeals for the Second Circuit) is reproduced at A 49.

The March 13, 1998 Opinion of the United States District Court for the Southern District of New York (dismissing the Complaint for lack of subject matter (foreign sovereign immunity) and personal jurisdiction is reported as *Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, 996 F. Supp 326 (S.D.N.Y. 1998) and is reproduced at A 18-36.

The November 16, 1998 Memorandum Opinion and Order of the United States District Court for the Southern District of New York (granting TASK's motion for reconsideration of the March 13, 1998 Opinion of the district court and, on reconsideration, denying SFTC's motion to dismiss the Complaint) is electronically reported as *Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, 1998 WL 799671 (S.D.N.Y., Nov. 17, 1998) (No. 96 Civ. 2893 (MGC) and is reproduced at A 37-45.

STATEMENT OF JURISDICTION

On February 25, 2000 the Court of Appeals reversed the district court's denial of SFTC's motion to dismiss for lack of jurisdiction pursuant to the commercial activity exception of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. 1605(a)(2). On September 6, 2000, the Court of Appeals denied TASK's petition for rehearing, thereby upholding its February 25, 2000 decision. Pursuant to Supreme Court Rule 13.3, this petition is being filed within ninety days of the date and entry of that decision. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

The Court of Appeals had appellate jurisdiction over SFTC's appeal of the district court's denial of its motion to dismiss, because the denial of a foreign state's assertion of sovereign immunity is immediately appealable as a collateral order. *Rein v. Socialist Peoples Libyan Arab Jamahiriya*, 162

F.3d 748, 755-56 (2d Cir. 1998); *Hanil Bank v. PT. Bank Negara Indonesia*, 148 F. 3d 127, 130 (2d Cir. 1998).

STATUTORY PROVISIONS INVOLVED[2]

§1605 General exceptions to the jurisdictional immunity of a foreign state

(a) *A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —*

....

(2) *in which the action is based* upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or *upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;* 28 U.S.C. 1605(a)(2) (emphasis added)[3]

STATEMENT OF THE CASE

Jurisdiction in the district court was based upon 28 U.S.C. § 1330(a), which grants jurisdiction to the district courts over any action against a foreign state for "which the foreign state is not entitled to immunity . . . under [the FSIA]." (A 50)

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[2] The parties' dispute centers around the interpretation and application of the third clause of 28 U.S.C. § 1605(a)(2) by this Court and various Courts of Appeals. The other statutory provisions referred to herein are set forth in the Appendix to this petition.

[3] TASK invoked the district court's subject matter jurisdiction in the proceedings below pursuant solely to the "direct effect" or third clause of the commercial activity exception of the FSIA set forth at 28 U.S.C. § 1605 (a)(2).

Nature of the Case

TASK commenced this action to convert three default judgments of the Supreme Court of Hong Kong (A 99-108) into United States judgments. The judgments were obtained against SFTC, a disclosed principal of Harlifax Limited (In Liquidation) ("Harlifax"), formerly known as Vincor Shipping Co. Ltd. ("VSL").

The 1993 and 1994 judgments, obtained by TASK via assignment, reflect various outstanding liabilities of SFTC to TASK which arose out of a series of twenty one voyage charter parties and contracts of affreightment (the "contracts"). The contracts were entered into in 1984 and 1985 by TASK, as the vessel owner, and VSL on behalf of its disclosed principal, SFTC. VSL was authorized to charter the vessels and act as agent for SFTC, the purchaser and receiver of the cargoes. SFTC's refusal to satisfy its obligations under these judgments resulted in the institution of the action by TASK in the district court below.

The Course of the Proceedings and the Disposition Below

Pursuant to 28 U.S.C. § 1330(a) (A 50), which grants jurisdiction to the district courts over any actions against a foreign state for which the foreign state is not entitled to immunity under the FSIA, TASK filed its original Complaint in the United States District Court for the Southern District of New York on April 22, 1996. On November 1, 1996, SFTC filed a motion to dismiss the Complaint on the grounds of alleged lack of subject matter jurisdiction (immunity from suit under the FSIA), personal jurisdiction, and failure to state a claim under Article 53 of New York's CPLR. TASK filed an Amended Complaint on December 3, 1996 and, on January 17, 1997, SFTC filed a second motion to dismiss on the same grounds on which it initially relied.

In an opinion dated March 13, 1998 (A 18-36) the Hon. Miriam G. Cedarbaum, U.S.D.J. granted SFTC's motion to dismiss on the Rule 12(b)(1) and 12(b)(2) grounds asserted, but declined to reach the Rule 12(b)(6) issue in light of the dismissal on jurisdictional grounds. (A 35)

The district court initially rejected TASK's assertion of a commercial activity exception to immunity based upon the third clause of 28 U.S.C. § 1605(a)(2) due to two factual findings subsequently determined by Judge Cedarbaum on reconsideration to be erroneous. The district court had erroneously concluded that:

> Unlike the contract in *Weltover*,[4] however, the Contracts in this case do not require the demurrage payments at issue to be made to plaintiff's New York bank account. The Contracts provide that "freight" is to be paid in New York, but make no reference to the place of payment of demurrage. (Complaint ¶22 and Ex. 17.) There is no allegation in the complaint that VSL or SFTC failed to make any freight payments required by the Contracts. (A 28-29)

Judge Cedarbaum concluded in this regard that "[a]bsent a contractual requirement that demurrage[5] be paid in New York, the nonpayment of demurrage in New York is not a "direct effect" in the United States within the meaning of the FSIA." (A 29)

In initially rejecting TASK's reliance on the commercial activity exception, the district court also erroneously stated that "the New York account that was designated for the payment of freight was not the ultimate place of payment," but was rather "merely a correspondent account." (*Id.*)

Judgment was entered dismissing the action on March 18, 1998. However, on November 16, 1998, the district court granted TASK's motion for reconsideration, vacated the

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[4] The district court's reference is to the governing Supreme Court precedent herein, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S.Ct. 2160 (1992).

[5] Demurrage, in maritime law, is "the sum which is fixed by the contract of carriage, or which is allowed, as remuneration to the owner of a ship for the detention of his vessel beyond the number of days allowed by the charter-party for loading and unloading or for sailing." *Black's Law Dictionary* 432 (6th ed. 1990).

March 13, 1998 ruling and denied SFTC's motion to dismiss. (A 37-45) The district court acknowledged in its November 16, 1998 decision that it had erred in its March 13, 1998 dismissal when it found with respect to the "direct effect" issue: (1) that the Contracts only required the payment of freight and not demurrage into the New York account (A 41; A 86) and (2) that the Amended Complaint did not allege that the defendant failed to make freight payments required by the Contracts to the New York account. (A 41; A 80)

Citing *Hanil Bank v. PT.Bank Negara Indonesia*, 148 F.3d 127, 133 (2d Cir. 1998), the district court held that SFTC's "failure to make contractually required payments to Transatlantic's [TASK's] New York account constituted a "direct effect" in the United States within the meaning of the FSIA" notwithstanding the fact that the New York bank named in the parties' contracts as the designated place of payment was a correspondent bank. (A 41-42)

Significantly herein, on reconsideration, the district court also rejected SFTC's argument that this action is not "based upon" TASK's claim of a failure to pay freight and demurrage to a New York account, but rather simply upon the enforceability of the three default judgments where rendered. (A 42-43)

SFTC filed a Notice of Appeal on December 16, 1998. On February 25, 2000 the Second Circuit Court of Appeals issued a decision and order reversing the November 16, 1998 Memorandum Opinion of the United States District Court for the Southern District of New York. (A 1-15)

The Second Circuit accepted for purposes of its opinion (1) that a "direct effect" within the meaning of 28 U.S.C. § 1605(a)(2) had occurred in the United States and (2) that the "kind of principal-agent relationship between SFTC and VSL [existed] that would make that effect directly attributable to SFTC." (A 7) The Second Circuit, however, disagreed that TASK's claim was "based upon" the "requisite U.S. Act of the assignor [VSL]" within the meaning of the third clause of 28 U.S.C. § 1605(a)(2). (A 11) The Second Circuit, like the

district court below, explicitly rejected SFTC's contention that the enforcement of a foreign judgment under the FSIA should be based upon a showing that the judgment was final, conclusive, and enforceable where rendered. It did so, first because of its prior decision in *International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 11-12 (2d Cir. 1989) in which the Second Circuit analyzed the conduct underlying the foreign default judgment to determine whether there was subject matter jurisdiction. It also reasoned that the approach urged by SFTC "would, in practice, preclude plaintiffs from enforcing any foreign judgments against foreign sovereigns in U.S. courts under § 1605(a)(2) [since] the elements of such an enforcement action would never have anything to do with the underlying commercial activity." (A 8)

On September 6, 2000 the Court of Appeals denied TASK's Petition for Rehearing in connection with the February 25, 2000 Order of the Court of Appeals (A 16-17) and this petition followed.

STATEMENT OF FACTS

Throughout 1984 and 1985, TASK entered into twenty-one charter party agreements with VSL, a Hong Kong corporation formed in 1984 pursuant to a joint venture Cooperation Agreement between SFTC, Shanghai Municipal Metalurgical Bureau, and Vincor Limited of Hong Kong. (A 67, ¶6) VSL was formed, *inter alia*, "to act as agent for all provinces and municipalities throughout the country. . . ." (A 67, ¶7(i))

As confirmed by SFTC's deputy general manager, Mr. Ku Kam (A 90:6) in his sworn testimony during the Hong Kong hearings, which resulted in the commencement of three legal proceedings against SFTC and the three judgments at issue herein, the purpose of VSL was to act as the agent of SFTC for, *inter alia*, the shipment of freight. (A 92:10-13) Mr. Ku Kam was responsible for imports (A 90:9) and had signed the Cooperation Agreement on behalf of SFTC.

Under the terms of the contracts, TASK agreed to ship 350,000 metric tons of cargo to Shanghai, China. (A 69, ¶15) Although VSL negotiated and executed these contracts, it did

so as the agent of its disclosed principal, SFTC. (A 69, ¶16; A 70, ¶19) SFTC was the actual purchaser and recipient of the goods shipped, the ultimate beneficiary of the contracts, and the party who assumed the final responsibility for the freight and demurrage. (A 69, ¶17; A 71, ¶25) Aside from SFTC's assumption of financial responsibility for the contracts entered into by VSL in connection with its principal/agent relationship with SFTC, various contemporaneous documents contained in the record below reflect SFTC's explicit agreement to pay VSL for any demurrage as well as freight costs incurred under the contracts. (A 69, ¶¶16-17; A 71, ¶25)

All of the contracts and related invoices provided for the payment of freight, demurrage, and despatch in United States Dollars. Pursuant to various "Rider Clauses" of the contracts, freight payments were to be and were, in fact, made payable to TASK's New York correspondent bank, Northern Trust International, New York. (Copies of a standard freight payment clause extract from the charter parties and a typical bank payment advice are attached hereto at A 86-87 and A 88, respectively.)

Throughout 1984 and 1985 the port of Shanghai was severely congested, which caused a majority of the ships chartered from TASK to be delayed beyond the time specified in the contracts. These delays caused VSL to incur substantial demurrage in favor of TASK, as provided for under the contracts. (A 71, ¶24) SFTC, however, failed to pay VSL for these demurrage costs, and VSL, in turn, failed to remit to TASK's New York bank account designated in the contracts, the demurrage and five percent balance of freight to which TASK was entitled. (A 71, ¶26)

Task was then forced in 1985 to pursue its demurrage claims, as well as the five percent balance of freight claims due it under the charter parties, in Hong Kong arbitration proceedings, as required under the terms of the contracts. (A 70, ¶23; A 71, ¶27) All of these claims were submitted to a single arbitration panel (A 71, ¶27), and SFTC retained separate counsel to defend against TASK's claims. (A 71, ¶28)

In November 1987, about a month before the arbitration panel issued an interim award, VSL changed its name to Harlifax Limited ("VSL/Harlifax"), and VSL/Harlifax became a successor in interest to the liabilities of VSL. (A 72, ¶¶30-32) Then, in December 1987, the panel handed down its interim award in favor of TASK, relating to claims under twelve of the charter parties, which was based on certain admissions VSL had made to the arbitration panel. This interim award was later reduced to a judgment by the High Court of Hong Kong, and was eventually satisfied. (A 72, ¶31)

From December 12 to December 15, 1988, a three-person arbitration panel held hearings in Hong Kong on the remainder of the disputed contracts. (A 72, ¶33) Anticipating an adverse ruling, on December 30, 1988, VSL/Harlifax declared voluntary liquidation in Hong Kong. (A 72-73, ¶35) Given that VSL/Harlifax had made several substantial capital transfers to SFTC between October 1986 and November 1988, and as all of VSL's other major creditors had been repaid before that winding up, it became clear that VSL/Harlifax's liquidation was made in an effort to defraud TASK out of the monies rightfully due it. (A 72-73, ¶¶35, 37-39) On June 30, 1989, the arbitrators entered an award in TASK's favor on some (but not all) of the outstanding contract disputes. (A 73-74, ¶¶40-42)

Upon the application of TASK, the Supreme Court of Hong Kong appointed Deloitte Touche Tomahatsu as liquidators in March 1991 to investigate the questionable circumstances surrounding the voluntary liquidation of VSL/Harlifax. (A 74, ¶43) The liquidators applied to the court for an examination of the former directors and officers as well as the solicitors and auditors of VSL/Harlifax. (A 74, ¶44) Based on the information received during the hearings, and as a result of various investigations, the liquidators commenced three legal proceedings against SFTC and the directors of VSL/Harlifax. (A 74, ¶45)

On May 11, 1990, TASK filed its proof of debt with the liquidators, which included all claims then outstanding. (A 74, ¶46) SFTC was properly served in the liquidation proceeding

(A 75, ¶49) but failed to enter an appearance. (A 75, ¶50) The liquidators found SFTC to be liable for VSL/Harlifax's debts to TASK, as its disclosed principal and, in accordance with that finding, the Supreme Court of Hong Kong entered three default judgments against SFTC, the sum of which totaled U.S. $1,782,419.11. (A 75-76, ¶¶51-52)

Those judgments became final (A 76, ¶54), and VSL/Harlifax assigned its rights thereunder to TASK. (A 78, ¶64) SFTC, however, has refused to satisfy these judgments. (A 76, ¶53) This enforcement action followed and was filed in the District Court for the Southern District of New York on April 22, 1996.

REASONS FOR GRANTING THE WRIT

From this country's earliest beginnings until 1952, foreign states were generally afforded absolute immunity from suit in our courts. *Argentine Republic v. Amerada Hess Shipping Corporation,* 488 U.S. 428, 434, n.1, 109 S.Ct. 683, 688, n.1 (1989). However, in 1952 the State Department adopted the "restrictive" theory of foreign sovereign immunity under which such immunity was to be limited to suits involving the sovereign or public acts — and not the commercial or private acts — of foreign states. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 487, 103 S. Ct. 1962, 1968 (1967). Congress codified the restrictive theory of foreign sovereign immunity by enacting the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 et seq., in 1976, thereby providing " the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic*, 488 U.S. at 443, 109 S. Ct. at 693.

The well established policy of the FSIA is to assure both foreigners and Americans who engage in commercial transactions with foreign states that their rights will be addressed in our courts "whenever possible." *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 699, 96 S. Ct. 1854, 1863 (1976). It is generally acknowledged that "the single most important exception to foreign state immunity under the FSIA is the 'commercial activity exception,'" 28 U.S.C.

§ 1605(a)(2). *Hanil Bank v. Pt. Bank Negara Indonesia (Persero)*, 148 F.3d 127, 130 (2d Cir. 1998). The interpretation and scope of the third clause or "direct effect" exception within that provision are at the core of this dispute.

The Second Circuit's decision, which erroneously construed the third clause of the exception to contain a "requisite U.S. Act" (A 11), conflicts sharply with the construction and "based upon" analysis not only in the governing Supreme Court precedent herein, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S.Ct. 2160 (1992), but in the very decision relied upon by the Second Circuit in rendering its decision, *Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S. Ct. 1471 (1993). If the Court of Appeals' decision is permitted to stand, future litigants with meritorious claims in the Second Circuit will be foreclosed by a requirement which, in actuality, does not exist in the statutory provision.

Moreover, the Second Circuit's decision has erroneously expanded the parameters of sovereign immunity by virtually precluding the ability of all assignees to invoke the subject matter jurisdiction of district courts under this exception. By sanctioning an immunity on new grounds which the legislature has not intended, the Court of Appeals has undermined the legislature's objective in enacting the FSIA, and created an unintended deterrent or obstacle for all future assignees who seek to adjudicate assigned claims or judgments under the "direct effect" prong of the FSIA's commercial activity exception. Thus, because of the adverse, practical effect this decision will have on all American and foreign assignee/ litigants in the future, the Second Circuit's decision is of overriding national and international importance.

The ruling of the Court of Appeals has additionally created an inter-circuit split of authority since, last year, the Fifth Circuit Court of Appeals found subject matter jurisdiction under the direct effect exception of the FSIA despite the identical ground unsuccessfully relied upon by the defendant sovereign therein, namely, the plaintiffs' status as assignees. In upholding the subject matter jurisdiction of the district court under the direct effect exception, the Fifth Circuit in

Byrd v. Corp. Forestal Y Industrial de Olancho S.A., 182 F.3d 380, 389-91 (5th Cir. 1999) explicitly stated that the plaintiffs' status as assignees "does nothing to weaken the relationship between [the parties]; appellees' status as assignee[s] means that they replace for all effective purposes the original lessee." Similarly, the Tenth Circuit Court of Appeals in *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1218 (10th Cir. 1999), while not specifically involving an assignee's rights under the FSIA, also supports the proposition that a direct contractual relationship between plaintiffs and the foreign sovereigns they seek to sue is *not* required under the FSIA. The Second Circuit's express reliance for its decision upon petitioner's status as an assignee, as well as its conclusion that "any assigned or purchased judgment is unlikely to qualify as 'based upon' the 'requisite U.S. Act' of the assignor" (A 11) is not only based upon an incorrect construction of the statutory provision, but is sharply at odds with these two Circuit Court of Appeals decisions.

Finally, the injustice which would result from the approach taken by the Second Circuit is magnified in the case at bar because petitioner was, in fact, a party to the contracts which gave rise to the judgments which were ultimately obtained by assignment. Petitioner's inability to obtain the judgments directly stems from the defendant sovereign's intentional dissolution of its agent, VSL, petitioner's contractual partner under the subject contracts, before petitioner could conclude the ongoing arbitrations. If allowed to stand, the Second Circuit's decision would not only bar foreign, but American, plaintiffs from suing under the FSIA who have been injured in their dealings with temporary, intermediary agents, created and destroyed at will by foreign sovereigns in the commercial arena. It would circumvent the very purpose of the FSIA to permit foreign states to cloak themselves with a shield of immunity, intended only for their sovereign acts, when they act through corporate agents/instrumentalities specifically created to carry out their private, commercial transactions.

For all of the foregoing reasons and those which follow, petitioner TASK respectfully requests that this petition for certiorari be granted.

ARGUMENT

POINT I

THE COURT OF APPEALS' CONSTRUCTION OF THE "BASED UPON" REQUIREMENT OF THE THIRD CLAUSE OF § 1605(a)(2) CONFLICTS WITH THAT OF THIS COURT AS ARTICULATED IN *SAUDI ARABIA v. NELSON, 507 U.S. 349 (1993)* AND *REPUBLIC OF ARGENTINA v. WELTOVER*, 504 U.S. 607 (1992).

In relying upon *Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S.Ct. 1471 (1993) and concluding that "TASK has not made allegations sufficient for this Court to find that its action against SFTC is based upon *VSL's assumedly U.S. Acts*" (A 11) (emphasis added), the Court of Appeals erroneously applied the requisite U.S. activity referred to in the first clause of § 1605(a)(2) to TASK's invocation of the provision's third clause, which contains no such requirement.[6]

The commercial activity exception states in full:

> **§1605(a)(2) General exceptions to the jurisdictional immunity of a foreign state**
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case—
>
> ....

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[6] The Court of Appeals' decision (A 11) further concludes that "any assigned or purchased judgment is unlikely to qualify as [being] 'based upon' ***the requisite U.S. Act*** **of the assignor**. . . ." The specific concern of the Court of Appeals regarding the effect of TASK's status as assignee of the judgments is fully addressed herein at Point II *infra*. Here TASK focuses solely upon whether any "requisite U.S. Act" is contained within the third clause of § 1605 (a)(2).

(2) in which the action is *based upon a commercial activity carried on in the United States* by the foreign state; *or* upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; *or upon an act outside the territory of the United States* in connection with a *commercial activity* of the foreign state *elsewhere* and that act causes a *direct effect in the United States*;

Thus, a plain reading reveals that there are three distinct, disjunctive clauses within the commercial activity exception, which distinguish between three distinct situations upon which an action under § 1605(a)(2) can be "based." The first clause has one requirement, the second clause has two, and the third clause has three requirements.

To satisfy the first clause, one must show only that the U.S. action is based upon the sovereign's **commercial activity in the United States**. To satisfy the second clause, the U.S. action must be based upon (1) the sovereign's **act in the United States**, (2) in connection with the sovereign's **commercial activity outside the United States** ("elsewhere"). To satisfy the third clause, the U. S. action must be based upon (1) **an act** of the sovereign **outside the U.S.** which is (2) in connection with **commercial activity outside the U.S.** (i.e. "elsewhere"), and (3) the act (outside the United States) must have caused a **"direct effect" in the United States**. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992). Thus, under the third clause, only the "direct effect" must occur *within* the United States. Both the "act" and the "commercial activity" of the sovereign, under the third clause, must occur *outside* the United States.[7]

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[7] Reduced to its basic terms, § 1605 (a)(2) requires the following:

1st clause:	commercial activity *in* the U.S.
2nd clause:	an act *in* the U.S.; commercial activity *outside* the U.S.
3rd clause:	an act *outside* the U.S.; commercial activity *outside* the U.S.; direct effect *in* the U.S.

A. The Court of Appeals Blurred the Clear Distinction Between the Requirements of the First and Third Clauses of 28 U.S.C. § 1605(a)(2) as Articulated by this Court.

TASK commenced this action pursuant to the third or "direct effect" clause of § 1605(a)(2). Under TASK's analysis, VSL's repeated breaches of the charter parties it entered into with TASK on behalf of its disclosed principal, SFTC, constitute the "acts" outside the United States, which satisfy the first requirement of the third clause. These "acts" (the breaches) occurred in connection with SFTC's commercial activity outside the United States (the charter parties), which satisfy the second requirement of the third clause. Finally, these acts or breaches caused a "direct effect" in the United States when money that was supposed to have been delivered to a New York bank under the terms of the contract did not arrive there, which satisfies the third requirement. *See Weltover*, 504 U.S. 607, 617-19, 112 S.Ct. 2168-2169 (1992) (applying the third clause of section 1605 (a)(2)).

The Court of Appeals' primary reliance on *Saudi Arabia v. Nelson*, 507 U.S. 349, 356, 113 S.Ct. 1471, 1477 (1993) to support its conclusion that there is no "requisite U.S. Act" in this case (A 11), while correct with respect to actions based upon the first (and second) clauses of § 1605(a)(2), is totally misplaced with respect to this action which is based upon the third clause which, by contrast, requires an act outside the U.S.; commercial activity outside the U.S.; and a direct effect in the U.S. and not, as the Second Circuit stated a "U.S. Act." There was no "act" in the United States or "commercial activity carried on in the United States" by the Republic of Argentina in *Weltover*. The *only* connection to the United States in *Weltover*, for the purpose of the Court's subject matter jurisdiction analysis under the third clause of § 1605(a)(2), was that the "direct effect" occurred here when the defendant sovereign failed to make the required payments to the New York bank by rescheduling the maturity dates on certain bonds it had issued.

The Second Circuit, in analyzing the meaning of "based upon" as it relates to the third clause of § 1605(a)(2), looked to the Supreme Court decision in *Nelson* which held that "the Nelsons' action is not 'based upon a commercial activity' within the meaning of *the first clause of § 1605(a)(2)*. . . ." 507 U.S. at 363, 113 S.Ct. at 1481. (emphasis added) This Court then concluded that:

> "based upon" requires a degree of closeness between the acts giving rise to the cause of action and those needed to establish jurisdiction that is considerably greater than common law causation requirements.

(A 9, citing *Nelson*, 507 U.S. at 357, 113 S.Ct. at 1471.) The Court of Appeals, in effect, accepted SFTC's repeated argument that the Supreme Court's holding and rationale in *Nelson* applies in this case. It also accepted SFTC's contention that jurisdiction in this case, given the dictates of *Nelson,* requires not only commercial activity in this country, but that the commercial activity be "substantial" and have a "significant nexus" between it and TASK's cause of action.

Nelson, however, reveals that the Supreme Court in that case recognized that "based upon" has three different meanings when applied to each of the three clauses of § 1605(a)(2):

> We noted that § 1605(a)(2) contains two clauses following the one at issue here [i.e. the first clause]. The . . . third . . . allowing for jurisdiction where an action "is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." Distinctions among descriptions juxtaposed against each other are naturally understood to be significant . . . (citation omitted) *Congress manifestly understood there to be a difference between a suit "based upon" commercial activity [the first clause] and one "based upon" acts performed "in connection with" such activity.* The only reason-

> able reading of the *former* term calls for something more than a mere connection with, or relation to, commercial activity.

507 U.S. at 357-58, 113 S.Ct. at 1477-78. (emphasis added) The decision in *Nelson,* while correct with respect to the facts there, when a party relies upon the provision's first clause, clearly supports the opposite result when analysis is applied to the facts herein and an analysis of the third clause.

This distinction is perhaps made even clearer by the earlier Court of Appeals' decision in *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998). In *Filetech*, the Second Circuit noted that, when a suit is based on the *third clause* of 1605(a)(2), a plaintiff need only show that there is a "substantive connection" or a "causal link" between [the act(s) outside the United States on which the action is based] and the commercial activity,"[elsewhere] *id.* at 930-31, whereas under the *first clause*, a plaintiff must establish that his action is "'based upon' some 'commercial activity' . . . that had 'substantial contact' with the United States." *Id.* at 930. That is, only the first clause, requires the plaintiff to show "something more than a mere connection with, or relation to, commercial activity" taking place *in* this country. *Id.* (citing *Nelson*, 507 U.S. at 358, 113 S.Ct. at 1478).

Thus, the Second Circuit's statement that "nothing that TASK has alleged would permit us to find that the relationship required by the statutory language exists in this case" (A 10) is a non sequitur herein, since it relies upon the relationship requirement discussed in *Nelson* which is applicable to the first clause of § 1605(a)(2). Not only is there no U.S. commercial activity or U.S. act required by the third clause whatsoever, but the relationship between the "act" outside of the United States need only be "in connection with" the commercial activity carried on outside the United States. Contrary to the Second Circuit's recent decision, only the first clause requires "a significant nexus . . . between the commercial

activity in this country and a plaintiff's cause of action." *See Filetech*, 157 F.3d at 930.[8]

B. There was a Legally Significant Act Outside the United States, Which Caused the Acknowledged "Direct Effect" in the United States.

The Second Circuit stated in its decision that it was assuming all of TASK's factual allegations to be true, and more specifically stated that:

> TASK has raised sufficient issues of fact . . . so that at this stage of the proceedings it is appropriate to act as if a "[direct] effect in the United States" exists and as if there were the kind of principal-agent relationship between SFTC and VSL that would make that effect directly attributable to SFTC.

(A 7) Despite these assumptions, the Second Circuit went on to state, just prior to its holding, that:

> further analysis [of the "based upon" issue] in the context of this case would be unhelpful and speculative because nothing in the record indicates the legal basis of SFTC's obligation to pay VSL. (The Hong Kong court's determination that SFTC was bound to indemnify VSL for its liabilities to TASK does not tell us how or why this obligation arose.) (A 11)

TASK respectfully disagrees that the record is devoid of support for the legal basis of SFTC's obligation to pay VSL, i.e., the disclosed principal/agent relationship. Various exhibits attached to the Amended Complaint were fully addressed in the briefs submitted to the district court both in SFTC's motion to dismiss and in TASK's motion for reconsideration. The district court correctly accepted, for purposes of the motion to dismiss, the allegations in the Amended Complaint that SFTC was VSL's disclosed principal and that SFTC was

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[8] While the second clause speaks of "an act performed in the United States," neither the parties nor the Second Circuit focused on this clause.

found liable under the contracts because VSL had entered into the contracts as SFTC's agent. [A 22][9]

Notwithstanding the above-noted explicit acceptance by the Second Circuit of the principal/agent relationship for the purpose of their opinion, the Court later declined to further analyze the "based upon" factor given the absence of an express statement in the Hong Kong Judgments as to why SFTC was bound to indemnify VSL.

1. VSL's breach of its contractual obligations to TASK — the "Act" which this suit is "based upon" — is attributable to its disclosed principal, SFTC, under both Hong Kong and United States law.

The principal/agent relationship between SFTC and VSL (1) was decided by the Hong Kong Court, (2) is not subject to attack and (3) has been sufficiently alleged at this stage of these proceedings to withstand defendant's motion to dismiss.

According to Order 19, Rule 7 of the Rules of the Supreme Court of Hong Kong, a court must base a default judgment on the facts alleged in the complaint (or, in the parlance of Hong Kong law, the statement of claim). This rule reads, in pertinent part, as follows:

> Default of defence: other claims (O. 19, r. 7) (1) Where the plaintiff makes against a defendant or

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[9] Paragraph 51 of the Amended Complaint alleges more specifically that SFTC "was found by the liquidators . . . to be the principal of VSL/Harlifax, was adjudged liable and directed to indemnify VSL/Harlifax for all liabilities arising under the Contracts." (A 75, ¶¶48-51) The court testimony of the Deputy General Manager of SFTC, in which he admits the principal/agent relationship (A 91:19-22; A 92:10-13; A 94:14-21; A 95:15-20; A 96:9-A 97:22; A 98:1-11) contributed heavily to the finding by the liquidators that SFTC was the principal of VSL. The liquidators then commenced three actions against SFTC for indemnification of the amounts due TASK (A 74, ¶45), VSL's only major creditor (A 73, ¶38), alleging the principal/agent relationship.

> defendants a claim of a description not mentioned in rules 2 to 5, then, if the defendant . . . fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, apply to the Court for judgment, and on the hearing of the application *the Court shall give such judgment as the plaintiff appears entitled to on his statement of claim.*

(emphasis added). Chap. 4, High Court Ordinance, Cap. 4A, Order 19 Default of Pleadings, Rule 7. The rule clearly states that a court will render a judgment to the plaintiff consistent with the facts pled in his statement of claim. Therefore, a judge need not issue an opinion detailing the factual findings which underlie the judgment, since as a matter of law those facts must be those alleged by the plaintiff.

The Second Circuit was referred to three decisions of the Hong Kong courts which reflect the application of Order 19, Rule 7. *See Gribb v. Freyberger* [1919] WN 22 CA (Court of Appeal 1919); *SA Ancienne Fabrique Georges Piaget v. Longnex Ltd.*, 1998 HKC LEXIS 1371, at *1 (High Court of the Hong Kong Special Administrative Region ("SAR") Court of First Instance 1998); *Wing Hing (Tangs) Fabrics Mfg. Co. v. Ever Reach Freight Ltd.*, 1991 HKC LEXIS 860, at *5 (Court of Appeal 1991). Since VSL's Statement of Claim contained allegations of a principal/agent relationship between SFTC and VSL, the Hong Kong Court's ruling on SFTC's default must be construed as being consistent with those allegations.

The law of Hong Kong provides that a disclosed principal will be held liable under contracts entered into by its agent. *See But Chung Yin v. Billion Extension Development Ltd. & Anor.*, Action No. A6181 OF 1992, HIGH COURT, 1997-1 HKC 531; 1997 HKC LEXIS 31, at *17 December 1997 ("A principal is liable for the acts of his agent"). *See also, Jardine Engineering Corp Ltd. & Ors. v. Shimizu Corp., Construction*, List No 1 OF 1992, HIGH COURT, 1992-2 HKC 271; 1993 HKC LEXIS 400, at *92, 10 March 1993.

2. As established by this Court, a principal is liable for the acts of its agent under the FSIA.

The liability of a principal for the acts of its agents under the FSIA has already been well established by this Court. As noted by the Supreme Court in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S.Ct. 2591, 2597 (1983):

> *[t]he language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state.*

(citation omitted) Thus, if an agent would be liable in a given situation, a sovereign which has been denied immunity, is subject to the same substantive law in an FSIA dispute. *See also, McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 352 (D.C. Cir. 1995) (quoting Restatement (Second) of Agency § 26 (1957)).

Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 536 (5th Cir. 1992) makes clear that a plaintiff may either assert apparent or actual authority in relying upon agency principles to invoke subject matter jurisdiction under the FSIA. VSL's apparent authority to act on behalf of SFTC in connection with the subject contracts was abundantly supported by Exhibits attached to the Amended Complaint (A 83-85) and the actual authority of VSL to act on behalf of SFTC, as was confirmed under oath in Hong Kong by its deputy manager (A 90:6-9; A 92:10-13; A 94:14-21; A 95:15-20; A 96: 9-A 97:22).

POINT II

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THOSE OF THE FIFTH AND TENTH CIRCUIT COURTS OF APPEAL INSOFAR AS IT SUGGESTS THAT A PLAINTIFF'S STATUS AS AN ASSIGNEE PRECLUDES SUBJECT MATTER JURISDICTION IN A § 1605(a)(2) ACTION OR THAT A DIRECT CONTRACTUAL RELATIONSHIP IS REQUIRED BETWEEN A PLAINTIFF AND A DEFENDANT IN AN FSIA ACTION

Just prior to holding that TASK had failed to establish that its action was based upon the "requisite U.S. Act," the Second Circuit expressed its doubt that any assigned or purchased judgment could qualify as being "based upon the requisite U.S. Act of the assignor" for purposes of a § 1605(a)(2) action (A 11):

> [J]ust as we declined to decide whether suits on any foreign judgment are automatically too distant to be "based upon" the requisite Act,[10] so we need not determine today whether every assigned, or purchased, judgment fails to meet the statutory ["based upon"] requirement. It is enough for us to say that any assigned or purchased judgment is unlikely to

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[10] The Second Circuit, in fact, has previously ruled on actions to enforce foreign judgments against foreign sovereigns under the third clause of § 1605(a)(2) of the FSIA. See *International Housing v. Rafidian Bank Iraq*, 893 F.2d 8 (2d Cir. 1989) noted earlier in the Second Circuit's decision (A 8). *See also Seetransport Wiking Trader Schiffahrtsgesellschaft MBH v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994) (relying upon § 1605(a)(1)).

In specifically referring to *International Housing*, the Court of Appeals correctly acknowledged that "SFTC's contention [that the court must analyze the elements of an enforcement cause of action under CPLR 5304] seems to be inconsistent with our prior case law." *See* the discussion of the Second Circuit's reliance upon *International Housing* in rejecting SFTC "based upon" analysis *supra* at 7.

> qualify as [being] "based upon" the *requisite U.S. Act* of the assignor. . . .

Based upon a review of recent decisions by the Fifth and Tenth Circuit Courts of Appeals, TASK respectfully disagrees that assigned or purchased judgments, including those at issue herein, pose any automatic or likely problem in terms of failing to satisfy the "based upon" requirement.[11] An analysis of the case law of these other Circuit Courts of Appeals construing the commercial activity exception of the FSIA reflects that assignments have had no effect on an assignee's right to invoke the FSIA commercial activity exception.[12]

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[11] It is significant to emphasize in this regard that TASK was not a stranger to the transactions which formed the basis of these judgments. TASK did not "purchase" these assignments from VSL, but was, in fact, the party owed the freight and demurrage by SFTC under the contracts which are related to the judgments at issue. The Hong Kong proceedings were brought in the name of VSL, but at the request and on behalf of TASK, as VSL's only major creditor at the time. (A 74, ¶¶43-45, 38)

Presumably, the Court's reference to the "assigned or purchased *judgment*" being based upon an "act", rather than the U.S. suit being "based upon" an "act", reflects the Second Circuit's acceptance of the fact that, in an enforcement action (*e.g., International Housing*), the court analyzes the underlying conduct upon which the judgment is based.

[12] Similarly, a number of New York district court decisions have concluded that an assignment does not affect a plaintiff's ability to invoke the FSIA exception. In a case involving the government of Nigeria, the court found that although the plaintiff was not a party to the original contract, the Nigerian government's obligation to the plaintiff, as assignee, was unaltered and, thus, would not impair subject matter jurisdiction under the exception. *See Goodson & Co., v. Fed. Republic of Nigeria*, 558 F. Supp. 1204, 1206 (S.D.N.Y. 1983)

In *Colonial Bank v. Compaigne Generale Maritime*, 645 F. Supp. 1457 (S.D.N.Y. 1986), the mortgagee of a ship seized by a French corporation brought suit under § 1605(a)(2) for the ship's assigned earnings. *See id.* at 1458. While the court held that the effect of the seizure was not a "direct effect" under the FSIA, it did not bar the suit based on the plaintiff's status as an assignee. *See id.* at 1465.

In *Byrd v. Corp. Forestal Y Industrial de Olancho S.A.*, 182 F.3d 380, 389-91 (5th Cir. 1999), the Fifth Circuit found subject matter jurisdiction despite the defendants' argument that the plaintiff, as assignee, was not a party to the lease which formed the basis of the suit brought under the third clause of the commercial activity exception. *See id.*, at 391.

In *Byrd*, the plaintiff-appellee alleged that the defendant-appellants' business activities in Honduras had a direct effect in the United States.[13] *Id.* at 390. The Republic of Honduras owned 98% percent of the shares of defendant-appellant Corfino, a state-owned corporation which, in turn, owned a sawmill in Honduras. *See id.* at 382. Corfino leased the sawmill to defendant-appellant William Simmons who assigned the lease to co-plaintiff Simmons Lumber Company, S.A. Simmons Lumber Company was, in part, owned by plaintiffs Cortez Byrd and Doug Grissom, both of whom are American citizens. *See id.* at 382-383.

The plaintiffs alleged that the defendants' business activities in Honduras had a direct effect in the United States by causing a non-trivial financial loss to occur to Simmons Lumber Company, which is owned by United States citizens. *See id.* at 390. The defendants countered that it was not a direct effect because the plaintiff Simmons Lumber Company did not have a direct contractual relationship with the defendants, but rather was the assignee of the initial lease between Corfino and William Simmons. *See id.* at 390-391. In rejecting the argument of the defendants and holding that subject matter jurisdiction existed based on the direct effect of the financial loss to plaintiffs, the Fifth Circuit reasoned:

> According to appellees' [plaintiffs'] allegations, appellants [defendants] foresaw and perhaps even helped to plan the financial harms which occurred

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[13] The following description of the relationship between the parties, while not meant to be complete, is critical to an understanding of the court's holding that an assignee may invoke the subject matter jurisdiction of the district court under the FSIA.

> to appellees [plaintiffs]. The mere fact that appellees [plaintiffs] were the assignee of the lease at issue does nothing to weaken the relationship between [the parties]; appellees' status as assignee means that they replace for all effective purposes the original lessee.

Id. at 391.

Accordingly, contrary to the reasoning of the Second Circuit, TASK's status as an assignee does not weaken, much less preclude, the district court's exercise of subject matter jurisdiction under § 1605(a)(2) herein.

Additionally, a recent decision of the Tenth Circuit, *Southway v. Central Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999), while not squarely addressing the rights of an assignee under the FSIA, nevertheless supports the proposition that a direct contractual relationship between plaintiffs and the foreign sovereigns they seek to sue is not required under the FSIA. In *Southway*, the Tenth Circuit concluded that the plaintiffs could assert their cause of action against the sovereign defendants despite the absence of a direct contractual relationship. *Id.* at 1218 ("[W]e do not believe, contrary to Defendants' suggestion, that a direct contractual relationship between Defendants and Plaintiffs is necessary to sustain Plaintiffs' cause of action against Defendants under the FSIA").

Southway concerned the assignment of a percentage of the overpayment on a contract between the Nigerian National Petroleum Company ("NNPC") and a foreign contractor to an American attorney, Kirk Brown, which NNPC sought to recover. Brown was solicited to assist in collecting the overpayment. Brown then contacted several Colorado-based investors to defray the collection costs, which representatives of the Central Bank of Nigeria ("CBN") and the Republic of Nigeria ("RN") demanded prior to the pay off. *See id.* at 1212-13. The collection scheme proved to be fraudulent, and the Colorado investors brought suit against Brown, CBN, and

RN to recover the approximately $500,000 they had advanced to Brown to pay the collection costs. *See id.* at 1213.

CBN and RN claimed that they were not proper parties to the suit because they did not directly participate in the underlying contract between the NNPC and the foreign contractor, nor did they participate in the assignment of the contract to Brown. *See id.* at 1218. The Tenth Circuit rejected the contention of CB and RN that the District Court improperly imputed the alleged commercial activities of NNPC to CBN and RN to establish subject matter jurisdiction. *See id.* In doing so, it rejected the suggestion that any direct contractual relationship between plaintiffs and defendants is necessary under the FSIA. *See id.*

But for SFTC's intentional liquidation of its agent, VSL, TASK could have concluded the arbitration proceedings and sought to enforce its claims directly against SFTC as VSL's disclosed principal. Given the liquidation of VSL, however, TASK had no other option but to submit its unresolved claims to the liquidators and take an assignment of the judgments ultimately issued by the Hong Kong court. To allow Shanghai to use VSL to avoid the jurisdiction of the U.S. courts through the FSIA would clearly constitute an injustice. Congress did not design the FSIA to insure freedom from liability for foreign governments under all circumstances, but to protect foreign governments from being sued when acting in a sovereign capacity, not as active participants in the commercial market.

Despite petitioner's direct contractual relationship with SFTC's agent, VSL, in the underlying transactions, the Second Circuit concluded that "any assigned or purchased judgement is *unlikely* to qualify as based upon the requisite U.S. Act of the assignor." (A 11) This position affords TASK no avenue of relief in the instant matter, and is at odds with the jurisprudence of the Fifth and Tenth Circuits.

TASK respectfully disagrees that the assignment of any claim or judgment precludes a party from invoking the district court's subject matter jurisdiction under § 1605(a)(2) of

the FSIA. However, even assuming *arguendo* that factual distinctions between assigned judgments could be made in such situations, the facts of the instant case compel the conclusion that this assignee, who was entitled in the first instance to the proceeds of the contracts that gave rise to the foreign judgments, should have standing to assert an enforcement action under the FSIA against his contractual partner's disclosed principal.

POINT III

IN FAILING TO FOLLOW UNITED STATES SUPREME COURT PRECEDENT, THE SECOND CIRCUIT UNDERMINED THE CLEAR LEGISLATIVE INTENT UNDERLYING THE RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY CODIFIED IN THE FSIA.

In its decision, the Second Circuit stated:

> How we resolve the tension between *International Housing* and SFTC's position would have a significant impact on U.S. foreign relations. This is especially so, given that the United States is currently involved in negotiations concerning a proposed Hague Convention on the Recognition and Enforcement of Foreign Judgements. . . . Fortunately, we need not decide this sensitive question. . . .(A 8)

It is respectfully submitted that the Second Circuit's decision, as well as its reluctance to address whether foreign judgments can be enforced under the FSIA and, if so, whether the proper analysis under § 1605(a)(2) is a review of the conduct underlying the judgment, is directly contrary to the clearly expressed Congressional intent underlying the Foreign Sovereign Immunities Act of 1976.

This provision of the FSIA was intended to codify the "restrictive theory" of sovereign immunity the United States Department of State has adhered to since 1952. *See Republic of Argentina v. Weltover*, 504 U.S. 607, 612-613, 112 S.Ct. 2160, 2165 (1992); *Argentine Republic v. Amerda Hess Ship-*

ping Corp., 488 U.S. 428, 434, 109 S. Ct. 683, 688, n. 1 (1989). The policy considerations underlying the restrictive theory have been stated as follows:

> . . .[T]he commercial and private activities of foreign states do not give rise to sovereign immunity. Implicit in this position is a determination that adjudications of commercial liability against foreign states do *not* impede the conduct of foreign relations, and that such adjudications are consistent with international law on sovereign immunity. (emphasis added)

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 698, 96 S.Ct. 1854, 1863 (1976) (*quoting* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Phillip B. Perlman (May 19, 1952), reprinted in 26 Dep't of State Bull. 984-985(1952)).

Under the restrictive theory, sovereign immunity is limited to "cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform." *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1216 (10th Cir. 1999) (*quoting* H.R. 94-1487 at 14 (1976)). The FSIA was specifically intended to address the "potential sensitivity of actions against foreign states," with a goal "to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." *Cargill Int. S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (*quoting* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 32, 45).

In this regard, the FSIA represents a carefully crafted "balance between the provision of a convenient forum for claimants aggrieved in commercial dealings with foreign states and the promotion of comity and harmony between the United States and other nations", *Colonial Bank v. Compagnie Generale Maritime et Financiere*, 645 F.Supp. 1457, 1465 (S.D. N.Y. 1986) (*citing* House Report U.S. Code Cong. & Admin. News 1976 at 6616), and was intended to "assur[e] litigants

that . . . decisions are made on purely legal grounds. . . .", *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 488, 103 S.Ct. 1962, 1968 (1983) (*quoting* H.R. Rep. No. 94-1487, p. 77 (1976)).

In the instant matter, TASK respectfully submits that the Second Circuit's concerns about the potential political repercussions of deciding whether judgments can be enforced under the FSIA and, if so, the proper analysis to be undertaken, are unfounded. (A 7-8) A decision in TASK'S favor would not have a "significant" impact on U.S. foreign relations" (A 8). The restrictive theory of sovereign immunity codified by the FSIA is "consistent with [existing] international law on sovereign immunity." *Alfred Dunhill*, 425 U.S. at 698, 96 S.Ct. at 1864. In addition, the restrictive theory has been endorsed by an increasing number of foreign sovereigns. *See id.* at 702, n. 15. Such a concern is, in any event, more properly the domain of the legislature when it enacts statutory provisions, rather than that of the courts, whose function is to interpret and apply the provisions in accordance with the legislative intent. *See Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 828, 106 S.Ct. 3229, 3242 (1986) ("It is the duty of courts to interpret . . . laws and apply them in such a way that the congressional purpose is realized") (Brennan, J., dissenting).

The Congressional purpose behind the FSIA is clear. It is to limit foreign states' immunity to public acts and exclude from immunity those acts which are commercial in nature. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 359-360, 113 S.Ct. 1471, 1479 (1993); *Republic of Argentina v. Weltover, Inc.* 504 U.S. 607, 612-613, 112 S.Ct. 2160, 2165 (1992); *Argentine Republic v. Amerda Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 688 n. 1 (1989); *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 486-488, 103 S.Ct. 1962, 1967-1968 (1983); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698-700, 96 S.Ct. 1854, 1863-1864 (1976); *Sun v. Taiwan,* 201 F.3d 1105, 1107 (9th Cir. 2000); *Southway v. Central Bank of Nigeria,* 198 F.3d 1210, 1216 (10th Cir. 1999); *Hanil Bank v. Pt. Bank Negara Indonesia,*

148 F.3d 127, 130 (2d Cir. 1998); *Cargill Int. S.A. v. M/T Pavel Dybenko,* 991 F.2d 1012, 1016 (2d Cir. 1993).

In ruling as it did and in declining to address the inconsistency between SFTC's position and the Second Circuit's prior holding in *International Housing v. Rafidain Bank Iraq*, 893 F.2d 8 (2d Cir. 1989), out of misplaced concern regarding the potential impact on U.S. foreign relations, the Second Circuit failed to interpret and apply the FSIA in accordance with Congressional intent. Congress has carefully delineated the proper parameters of sovereign immunity and has codified its policy considerations in the FSIA. In failing to follow its own analysis in *International Housing* and failing to combine that analysis with persuasive authority brought to its attention from the Fifth Circuit Court of Appeals concerning an assignee's right to invoke the commercial activity exception under the FSIA, the Second Circuit has unintentionally "undermine[d] the policy supporting the restrictive view of immunity, which is to assure those engaging in commercial transactions with foreign sovereignties that their rights will be determined in the courts whenever possible." *Alfred Dunhill of London, Inc.*, 425 U.S. at 699, 96 S.Ct. at 1863.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated: New York, New York
December 5, 2000

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: October 7, 1999 Decided: February 25, 2000)

Docket No. 98-9643

TRANSATLANTIC SHIFFAHRTSKONTOR[1] GMBH,

Plaintiff-Appellee,

–v.–

SHANGHAI FOREIGN TRADE CORPORATION,

Defendant-Appellant.

Before:

JACOBS, CALABRESI, and SOTOMAYOR,

Circuit Judges.

The defendant, an instrumentality of the People's Republic of China, appeals from a decision of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*) denying, upon reconsideration, defendant's motion to dismiss on the grounds of sovereign immunity and lack of personal jurisdiction.

Reversed.

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[1] Although the official caption for this case spells the Appellee's name as "Shiffahrtskontor," we note that, in its own documents, the Appellee spells its name in the correct German fashion, *i.e.*, "Schiffahrskontor."

Mary Ann C. Marlowe, Keane & Marlowe, East Brunswick, N.J., for *Plaintiff-Appellee*.

Elliot Silverman, McDermott, Will & Emery, New York, N.Y., for *Defendant-Appellant*.

CALABRESI, *Circuit Judge*:

Defendant-Appellant Shanghai Foreign Trade Corporation ("SFTC"), an instrumentality of the People's Republic of China ("China"), appeals from a judgment of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, Judge) denying SFTC's motion to dismiss. The district court held that Plaintiff-Appellee Transatlantic Shiffahrtskontor GmbH ("TASK") had alleged sufficient facts to overcome defendant's motion, which asserted lack of subject matter jurisdiction because of sovereign immunity and lack of personal jurisdiction. Specifically, the court found that the facts TASK alleged were enough, if proven, (1) to invoke the exception to sovereign immunity for suits based upon acts related to the commercial activities of a foreign sovereign outside of the United States that have a direct effect within the United States, *see* 28 U.S.C. § 1605 (a)(2) (1994), and (2) to establish the existence of personal jurisdiction over SFTC in New York courts. We reverse.

I. BACKGROUND

In reviewing a district court's denial of a motion to dismiss, we assume all of the nonmoving party's factual allegations to be true. S*ee United States v. Gaubert*, 499 U.S. 315, 327 (1991). In July 1984, SFTC entered into a "Cooperation Agreement" with Shanghai Municipal Metallurgical Bureau and Vincor Limited, a Hong Kong company, pursuant to which a joint venture called Vincor Shipping Company Limited ("VSL") was established.

In 1984, TASK, a German corporation, contracted for the charter of TASK-owned vessels with VSL, which represented itself as an agent of SFTC. Ultimately, VSL and TASK entered into twenty-one contracts, all of them substantially the same. According to the terms of the contracts, payment was to be made by VSL into a bank account in New York in the following form: ninety-five percent of payment was to be made prior to delivery of the cargo and the remaining five percent plus any demurrage[2] would be paid upon delivery.

As a result of severe congestion in the port of Shanghai in 1984 and 1985, a majority of the ships operating under the contracts were delayed, some for as long as six weeks, and VSL thereby incurred substantial demurrage in favor of TASK. SFTC, which TASK alleges was to indemnify VSL for any demurrage (although TASK variously attributes this obligation to agency law and to some "internal agreement" between SFTC and VSL), failed to pay VSL for the demurrage costs. VSL in turn failed to pay TASK.

At different times between 1985 and 1989 and as called for in the contracts, TASK pursued through arbitration in Hong Kong its claims against VSL, including those for the unpaid demurrage. SFTC retained Hong Kong solicitors to participate in VSL's defense of these actions. Following a December 1987 arbitration award, part of TASK's claims were satisfied. An additional arbitral award was entered in favor of TASK on some of its other claims in June 1989.

Meanwhile, in December 1988, having changed its name to Harlifax, VSL declared voluntary liquidation in Hong Kong. TASK, as a creditor of VSL, requested that the Supreme Court of Hong Kong appoint bankruptcy liquidators for VSL. Once named, these liquidators, acting on behalf of VSL initiated

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[2] "Demurrage" is remuneration of the shipowner for the detention of its vessel beyond the number of days allowed by the charter-party. *See* Black's Law Dictionary 432 (6th ed. 1990).

three court proceedings in Hong Kong against SFTC. SFTC failed to appear and default judgments were entered in the name of VSL in all three cases. One judgment was to recover monies that VSL had transferred to SFTC prior to its declaration of bankruptcy. Another was for indemnification in the amount of the June 1989 arbitral award obtained by TASK against VSL. And the third judgment was for indemnification for the amount VSL owed TASK on TASK's remaining contractual claims. Significantly, the Hong Kong court gave no indication of what relationship between VSL and SFTC had caused SFTC to owe VSL these monies — why, in other words, it had to indemnify VSL. TASK was not a party in these suits. In March 1994, the liquidators assigned these three judgments to TASK in satisfaction of TASK's outstanding claims against VSL's bankruptcy estate.

Because SFTC failed to pay the judgments, TASK brought suit in the Southern District of New York in April 1996 seeking to convert the Hong Kong judgments into U.S. judgments. On March 13, 1998, the district court (Cedarbaum, J.) granted SFTC's motion to dismiss for lack of both subject matter and personal jurisdiction. Judge Cedarbaum found, first, that SFTC was immune from suit in federal court under the Foreign Sovereign Immunities Act ("FSIA") and, second, that TASK had failed to make a prima facie showing that SFTC was subject either to specific or to general jurisdiction in New York. On November 16, 1998, however, the district court granted TASK's motion for reconsideration and vacated its March 1998 decision. The court found that SFTC was suable under the third clause of 28 U.S.C. § 1605(a)(2), the commercial activity exception to the FSIA. It also found that, based upon representations made by TASK's counsel at oral argument, TASK had presented a prima facie case of personal jurisdiction.

SFTC now brings an interlocutory appeal of the district court's denial of its claim of sovereign immunity. We have

jurisdiction over this appeal because the denial, on FSIA immunity grounds, of a motion to dismiss is immediately appealable as a collateral order. *See Drexel Burnham Lambert Group Inc. v. Committee of Receivers for Galadari*, 12 F.3d 317, 324 (2d Cir. 1993).

II. DISCUSSION

A. *The FSIA and the Commercial Activity Exception*

In suits against foreign sovereigns, it is well settled that the FSIA provides the only basis for the subject-matter jurisdiction of U.S. courts. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Thus, a foreign state, including its agencies and instrumentalities, is presumptively immune from suit in U.S. courts unless a specific FSIA exception to such immunity applies. *See* 28 U.S.C. § 1603(a)-(b); *Nelson*, 507 U.S. at 355. TASK invoked two FSIA exceptions to immunity in the district court. The first was § 1605(a)(2), which creates what is known as the commercial activity exception to foreign sovereign immunity. The second was § 1605(a)(1), which permits suits when "the foreign state has waived its immunity either explicitly or by implication."

1. *The Commercial Activity Exception*

Section 1605(a) states that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). This exception contains two requirements: (1) there must be an act outside the United States in connection with a commercial activity of the foreign state that causes a direct effect in the United States and (2) the plaintiff's suit must be based upon that act.

i. *An Act Outside the United States Having a Direct Effect In the United States*

The act that TASK claims caused a direct effect "within the United States" in this case is the failure of VSL to deposit funds into a New York bank account as specified in the charter contracts. SFTC argues, however, that, on the facts of this case, such a failure to deposit could not have given rise to the requisite effect. It further asserts that, even if the failure to pay the money into the New York account were conceded to have caused an "effect in the United States," that effect was not the direct result of any act undertaken by SFTC. That is, SFTC contends that the contracts at issue in this case were between VSL and TASK, that SFTC was not a party to them and that it therefore had no obligation to make any payments into any New York account. At most, according to SFTC, SFTC breached a duty to indemnify VSL, which as a result failed to pay TASK in New York. SFTC claims, therefore, that its connection to the New York payment was mediated by VSL and that the effect in New York was, if anything, only indirectly related to any acts attributable to it.

TASK replies by arguing that, under Supreme Court precedent, the failure to pay money into the New York account gave rise to a sufficient effect within the States. *See Republic of Argentina v. Weltover*, 504 U.S. 607, 619 (1992) (finding a direct effect where Argentina failed to make a deposit into a New York bank account). TASK also argues that, because SFTC and VSL had a principal-agent relationship, the actions of VSL were, for the purposes of FSIA analysis, attributable to SFTC. It would follow that VSL's failure to pay into the New York account were as much actions of SFTC as if VSL had never even been involved. The effect in New York would, as a result, qualify as a direct effect of SFTC's acts.

Both the questions of whether the effect is enough to meet the statutory requirements and whether the necessary principal-agent relationship exists are complex. But we need not decide them. We will instead assume, for purposes of this opinion, that TASK has raised sufficient issues of fact as to each so that at this stage of the proceedings it is appropriate to act as if an "effect in the United States" exists and as if there were the kind of principal-agent relationship between SFTC and VSL that would make that effect directly attributable to SFTC.

ii. *Based Upon*

But, in order to find jurisdiction under the third clause of § 1605(a)(2) of the FSIA, it is not enough to find that the defendant committed some act "in connection with a commercial activity of the foreign state elsewhere and that act cause[d] a direct effect in the United States." We must also find that the plaintiff's suit in U.S. courts is "based upon" that act.

SFTC argues that because this suit is to enforce Hong Kong judgments, it is "based upon" those judgments rather than on the acts that underlie them. In support of this contention, it cites language in *Nelson* indicating that an action is based upon "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. at 357. And it asserts that the elements of a claim on a foreign judgment — what, in other words, must be shown in order to enforce such a judgment in a U.S. court — are simply that the foreign judgment be final, conclusive, and enforceable where rendered. *See Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 583 (2d Cir. 1993). None of these elements, SFTC points out, has anything to do with the acts that TASK has

identified as having caused a direct effect within the United States.[3]

SFTC's contention, however, seems to be inconsistent with our prior case law. *See International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 11-12 (2d Cir. 1989) (examining the conduct — *i.e.*, the breach of contract — underlying a foreign judgment to determine whether jurisdiction existed in a suit to enforce a default judgment entered in the Bahamas).[4] Moreover, SFTC's position would, in practice, preclude plaintiffs from enforcing any foreign judgments against foreign sovereigns in U.S. courts under § 1605(a)(2). For the elements of such an enforcement action would never have anything to do with the underlying commercial activity.

How we resolve the tension between *International Housing* and SFTC's position would have a significant impact on U.S. foreign relations. This is especially so, given that the United States is currently involved in negotiations concerning a proposed Hague Convention on the Recognition and Enforcement of Foreign Judgments. *See* Arthur T. Von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 Brooklyn J. Int'l L. 17, 18 (1998). Fortunately, we need not decide this sensitive question either. For, even assuming that — contrary to SFTC's contention — we

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[3] SFTC also appears to argue that the provision within the FSIA establishing jurisdiction over suits to confirm foreign arbitral awards, *see* 28 U.S.C. § 1605(a)(6), implies that the judgments of foreign courts against foreign sovereigns are not enforceable in U.S. courts because there is no provision in the FSIA creating jurisdiction over suits to enforce them.

[4] International Housing was decided prior to *Nelson* and is in some tension with a literal reading of the definition of "based upon" used by the Supreme Court in *Nelson*. But, because *Nelson* did not involve an action to enforce a foreign judgment, the Supreme Court did not expressly address this issue when formulating its definition of "based upon" in that case. And we take no position today concerning the impact of Nelson on our approach in *International Housing Ltd.*

are permitted to look at the conduct underlying the Hong Kong judgments, we nevertheless conclude that TASK has failed to create an issue of fact as to whether its suit in the district court was "based upon " an act that "causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2) (emphasis added).

What does "based upon" mean? At a minimum, that language implies a causal relationship. Thus, at the least, the "act that caused a direct effect in the United States" ("the Act") must be a "but for" cause of the judgments that are the ground of this suit. That is, it must be true that without the Act, there would be no judgments on which to sue. But this is not enough. Where a causal relationship is required, we must also always ask how close that relationship must be to suffice. When the causal requirement is imposed by the common law, that closeness is usually expressed in terms of proximate cause and of causal link or tendency. *See Moore v. Paine-Webber, Inc.*, 189 F.3d 165, 174 (2d Cir. 1999) (Calabresi, J., concurring). Where, instead, the requirement is statutory, it is the statute itself that establishes how near or how distant the "but for" cause must be if it is to meet the statutory test. *See Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234, 237 (2d Cir. 1996); *Moore*, 189 F.3d at 178 (Calabresi, J., concurring) ("It should not be forgotten, however, that the pertinent requirements of proximate cause in a RICO case are those intended by the legislature that passed the statute, and not those of the common law."). In the case before us, it is therefore the FSIA that determines the proximity — between the Act and the suit — that must be present in order for the suit to be "based upon" that Act.

We know from *Nelson* that "based upon" requires a degree of closeness between the acts giving rise to the cause of action and those needed to establish jurisdiction that is considerably greater than common law causation requirements. *See Nelson*, 507 U.S. at 357. We decline to decide today, as SFTC would

have us do, that any suit brought on a foreign judgment — rather than on the conduct that underlies that judgment — is too distant (though we do not exclude that possibility). But we conclude that nothing that TASK has alleged would permit us to find that the relationship required by the statutory language exists, in this case.

The legal proceedings against SFTC that resulted in the three default judgments that TASK now seeks to enforce were brought by VSL's Hong Kong liquidators against SFTC on behalf of VSL.[5] TASK now has a claim against SFTC only because the VSL liquidators chose to assign to TASK these judgments rather than some other assets that would have satisfied TASK's claims in the amount of HK$ 12,512,940.36 against VSL.[6] But how VSL's liquidators chose to pay TASK was not in any way dependent on the New York contract or on any acts in breach of that contract that had a direct effect in New York. And TASK was, presumably, indifferent to how this payment was to be accomplished.

Thus, VSL's obligations to TASK might have been satisfied with cash, with a pot of gold, or with HK$ 12,512,940.36 worth of bananas. Similarly, VSL might have assigned to TASK foreign court judgments that VSL obtained against SFTC for SFTC's breach of a contract whose entire locus and place of performance had nothing to do with the United States

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[5] These actions were allegedly brought by the liquidators at the request of TASK.

[6] The deed of assignment states that VSL "has admitted the Assignee [TASK] to proof as a creditor in the sum of HK$ 12,512,940.36 ('the liability'). The said proof was filed in respect of certain arbitration awards, a High Court judgment and claims under various charterparty agreements entered into between the Assignor (formerly known as 'Vincor Shipping Co. Ltd.') and the Assignee." The deed goes on to state that "[t]he Assignor has agreed to assign all or any of its rights against Shanghai Foreign Trade Corporation ('Shantra'), including certain judgments and judgment debts . . . to the Assignee for the agreed sum."

or with TASK. Had VSL done this, it clearly could not be argued that these judgments were "based upon" acts having a direct effect in the United States. For even assuming that foreign judgments, or the assignment of them, can ever satisfy the "based upon" requirement, if the acts upon which the assigned judgments are themselves grounded do not meet the "based upon" requirement of § 1605(a)(2) of the FSIA — *i.e.*, where they are not acts taken in connection with a commercial activity that caused a direct effect in the United States — an action to enforce the foreign judgments in U.S. courts must fail for lack of subject matter jurisdiction.

One could argue more broadly that any judgment that was purchased by, or assigned to, the plaintiff, is *ipso facto* too distant, even if that same judgment — had it been won directly by the plaintiff — would be proximate enough to qualify. Nevertheless, just as we declined to decide whether suits on any foreign judgments are automatically too distant to be "based upon" the requisite Act, so we need not determine today whether every assigned, or purchased, judgment fails to meet the statutory requirement. It is enough for us to say that any assigned or purchased judgment is unlikely to qualify as "based upon" the requisite U.S. Act of the assignor, and that further analysis in the context of this case would be unhelpful and speculative because nothing in the record indicates the legal basis of SFTC's obligation to pay VSL. (The Hong Kong court's determination that SFTC was bound to indemnify VSL for its liabilities to TASK does not tell us how or why this obligation arose.) Thus, even if we assume that this failure to pay had the requisite direct effect in the United States, we are bound, under the circumstances, to hold that TASK has not made allegations sufficient for us to find that its action against SFTC is in fact based upon VSL's assumedly U.S. Acts.

2. *Waiver of FSIA Immunity*

Before the trial court, TASK also argued that China (and therefore SFTC) had implicitly waived its sovereign immunity because China was a signatory to the Convention on the Recognition and Enforcement of Arbitral Awards (the "Convention"). The district court properly rejected the argument.

In *Seetransport*, we held that Romania, by becoming a signatory to the Convention and entering into a contract with an arbitration clause and participating in arbitration proceedings, had waived its sovereign immunity for the purposes of challenging U.S. jurisdiction over a suit to enforce the arbitral awards resulting from that contract. *See* 989 F.2d at 578-79. Moreover, after dismissing the claim for enforcement of the arbitration awards as time-barred, we found that a separate claim to convert a Paris Court of Appeals judgment, which dismissed the Romanian company's direct appeal of the arbitration awards, into a U.S. judgment had to be allowed under the same exception because "the cause of action is so closely related to the claim for enforcement of the arbitral award." *Id.* at 583.

Although one of the judgments in this case orders SFTC to pay VSL the amount awarded TASK in an arbitral award against VSL, there are differences between this case and *Seetransport* that preclude any direct application of our holding in that case to these facts. The judgment before us did not result from a direct appeal of the arbitral award, as in *Seetransport*, but rather from a suit by VSL against SFTC for indemnification. The judgment ordering indemnification — and not a judgment reviewing (and confirming) the arbitral award itself — is what TASK seeks to enforce in our courts. Because the implied waiver exception is to be construed narrowly, *see Drexel Burnham Lambert Group, Inc.*, 12 F.3d at 325, and because it is hard to view this suit as being in

essence a suit designed to enforce an arbitral award, we believe that the exception is inapplicable to this case.

III. CONCLUSION

Since we find no subject matter jurisdiction, we need not reach the question of personal jurisdiction over SFTC. We hold that the district court erred in concluding that SFTC was subject to suit in U.S. courts under the commercial activity exception of the FSIA. We likewise find that SFTC did not waive its immunity by signing the Convention enforcing arbitral awards. We therefore remand to the district court for the entry of an order granting SFTC's motion to dismiss.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 25th day of February, two thousand.

SDNY/NY NY
98-CV-2893
JUDGE CEDARBAUM

BEFORE:

Hon. Dennis Jacobs,
Hon. Guido Calabresi,
Hon. Sonia Sotomayor,
Circuit Judges.

Docket No. 98-9643

TRANSATLANTIC SHIFFAHRTSKONTOR GMBH,

Plaintiff-Appellee,

–v.–

SHANGHAI FOREIGN TRADE CORPORATION,

Defendant-Appellant.

UNITED STATES COURT
OF APPEALS FOR THE
SECOND CIRCUIT
FILED FEB 25 2000
Roseann B. MacKechnie, Clerk

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is REVERSED in accordance with the opinion of this Court.

FOR THE COURT

Roseann B. MacKechnie, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

A TRUE COPY
Roseann B. MacKechnie, Clerk
By: /s/
Deputy Clerk

MANDATE
SEP 13 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
United States Court House
40 Foley Square
New York, New York 10007

Roseann B. MacKechnie
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the _____ day of September two thousand.

UNITED STATES COURT
OF APPEALS FOR
THE SECOND CIRCUIT
FILED SEP 6 2000
Roseann B. MacKechnie, Clerk

Transatlantic Shiffahrtskontor GMBH,

Plaintiff-Appellee,

v

Dkt No: 98-9643

Shanghai Foreign Trade Corporation,

Defendant-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Transatlantic Shiffahrtskontor.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

Roseann B. MacKechnie, Clerk

By: /s/ Beth J. Meador, Esq.
Beth J. Meador,
Administrative Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRANSATLANTIC SHIFFAHRTSKONTOR GMBH,

Plaintiff,

- against -

SHANGHAI FOREIGN TRADE CORPORATION,

Defendant.

OPINION
96 Civ. 2893 (MGC)

APPEARANCES:

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CEDARBAUM, District Judge.

This is an action brought by Transatlantic Shiffahrtskontor GmBh ("Transatlantic"), a German corporation, to enforce three judgments entered by the Supreme Court of Hong Kong against Shanghai Foreign Trade Corporation ("SFTC"). SFTC moves to dismiss the complaint on the grounds of sovereign immunity, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. For the reasons discussed below, the complaint is dismissed.

BACKGROUND

SFTC and its Alleged Agent

According to the complaint, SFTC is an "agency or instrumentality" of the People's Republic of China ("China") within the meaning of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603. "Alternatively," the complaint pleads, SFTC is a "state-owned, separate legal enterprise . . . capable of suing and being sued in its own name and bearing independent legal liability." (Complaint ¶ 3.) In July 1984, SFTC entered into a "Cooperation Agreement" with Shanghai Municipal Metallurgical Bureau and Vincor Limited ("Vincor"), a Hong Kong company, pursuant to which a joint venture called Vincor Shipping Company Limited ("VSL") was established. (*Id.* ¶¶ 6-7.) Pursuant to the Cooperation Agreement, the complaint alleges, SFTC "acted as the principal and beneficial owner of VSL." (*Id.* ¶ 11.) VSL acted as the agent of SFTC, and was authorized to negotiate shipping deals, sell and purchase old or scrap vessels, engage in chartering and subchartering of vessels, issue bills of lading and generally engage in maritime transport. (*Id.* ¶¶ 11-12.)

The Transatlantic Contracts With VSL

In 1984, Transatlantic contracted to charter its vessels from VSL, which was described to Transatlantic as the agent of SFTC, one of China's leading importers. In 1984 and 1985, after an initial test shipment of steel from Hamburg and

Norway to Shanghai, Transatlantic transported several hundred thousand metric tons of various cargos to Shanghai in 21 shipments, pursuant to individual voyage charter parties and contracts of affreightment (the "Contracts") with VSL. (*Id.* ¶¶ 13-15.)

The Contracts and related invoices provided for the payment of freight, demurrage and despatch in United States dollars. Various "Rider Clauses" of the Contracts called for freight payments to be made payable to Transatlantic's correspondent bank in New York, and such payments were so made. (*Id.* ¶ 22.) The Contracts provided that all disputes were to be resolved by arbitration in Hong Kong in accordance with the laws of Hong Kong. (*Id.* ¶ 23.)

Transatlantic alleges that at all times during the performance of the Contracts, VSL was authorized by and acted as the agent of SFTC, and that SFTC was the ultimate beneficiary of the Contracts. Transatlantic further alleges that VSL expressly represented to Transatlantic that VSL was acting on behalf of SFTC. (*Id.* ¶¶ 16-17, 21.) Moreover, according to the complaint, SFTC specifically approved all the important provisions of the Contracts, including the Contracts' arbitration clauses and freight and demurrage rates. (*Id.* ¶ 19.) The complaint does not allege that SFTC was a signatory to the Contracts.

The Demurrage Costs and Subsequent Arbitration

As a result of severe congestion in the port of Shanghai in 1984 and 1985, a majority of the ships operating under the Contracts were delayed — some for as long as six weeks — and VSL thereby incurred substantial demurrage in favor of Transatlantic pursuant to the terms of the Contracts. (*Id.* ¶ 24.) SFTC, which was to pay VSL for any demurrage pursuant to an alleged internal agreement between SFTC and VSL, failed to pay for the demurrage. VSL, in turn, failed to pay Transatlantic for the demurrage. (*Id.* ¶¶ 25-26.)

Between 1985 and 1989, Transatlantic pursued claims for demurrage and other claims against VSL under all 21 Contracts by way of arbitration in Hong Kong. (*Id.* ¶ 27.) SFTC was not named as a respondent in the arbitration proceedings. According to the complaint, however, SFTC retained Hong Kong solicitors to participate in the defense of Transatlantic's claims. (*Id.* ¶¶ 27-28.) Hearings on the disputed Contracts were held before a Hong Kong arbitration panel from December 12 to 15, 1988. (*Id.* ¶ 33.) VSL, which had changed its name to Harlifax Limited ("VSL/Harlifax") in November 1987, declared voluntary liquidation on December 30, 1988, purportedly in anticipation of an adverse arbitration award. (*Id.* ¶¶ 30, 35.) In addition, VSL previously had made three transfers of capital to SFTC between October 1986 and November 1988. (*Id.* ¶ 37.) On June 30, 1989, the Hong Kong arbitrators issued an award of U.S. $793,984.91 against VSL/Harlifax and in favor of Transatlantic for Transatlantic's claims on two Contracts. (*Id.* ¶¶ 40, 41.)

Actions in the Hong Kong Courts

After VSL/Harlifax went into liquidation, Transatlantic filed a proof of debt dated May 11, 1990 listing its outstanding claims against VSL/Harlifax. (*Id.* ¶ 46.) In March 1991, upon the application of Transatlantic, the Supreme Court of Hong Kong, High Court appointed the firm of Deloitte Touche Tomahatsu as liquidators to investigate "questionable circumstances" surrounding the voluntary liquidation of VSL/Harlifax. (*Id.* ¶ 43.) The liquidators commenced three legal actions against SFTC and the directors of VSL/Harlifax (*Id.* ¶ 45.) After SFTC failed to appear in the actions, default judgments were entered. (*Id.* ¶ 50.) An August 4, 1993 judgment in the amount of HK $4,771,886.57 (*i.e.*, Hong Kong dollars) was entered against SFTC for the amount awarded against VSL by the arbitrators on June 30, 1989. A September 24, 1993 judgment in the amount of HK $1,398,052.00 was entered against SFTC for monies transferred from VSL/Harlifax

to SFTC. Finally, a May 31, 1994 judgment in the amount of HK $7,741,053.79 was entered against SFTC for the "amount due" under the remaining Contracts. The complaint sets the total U.S. dollar value of the three judgments at $1,782,419.11. (*Id.* ¶ 52.) According to the complaint, SFTC was found liable under the Contracts (including the amount reflected in the June 30, 1989 arbitration award) and was directed to indemnify VSL/Harlifax for all liabilities arising under the Contracts between VSL and Transatlantic because VSL had entered into the Contracts as SFTC's agent. (*Id.* ¶ 51-52.)

SFTC did not appeal the judgments within the time allotted under Hong Kong law, and has refused to satisfy the judgments. (*Id.* ¶¶ 53-54.) According to the complaint, the judgments are valid, final, conclusive and enforceable under Hong Kong law. (*Id.* ¶ 54.) Transatlantic, to whom VSL assigned its rights against SFTC (*Id.* ¶ 64), now brings this action to enforce in this court the three unsatisfied judgments.

DISCUSSION

SFTC asserts several grounds in support of its motion to dismiss. First, SFTC argues that subject matter jurisdiction is lacking because it is immune from suit under the Foreign Sovereign Immunities Act.[1] SFTC further argues that it is not subject to personal jurisdiction in this forum. Finally, SFTC argues that Transatlantic fails to state a claim for relief because Article 53 of the New York Civil Practice Law and Rules ("CPLR"), under which Transatlantic seeks enforcement of the Hong Kong judgments, applies only to judgments of "foreign states." Hong Kong, SFTC contends, is not recognized by the United States as a "foreign state."

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[1] SFTC also argues that even if it is not an agency or instrumentality of China, there is no basis for admiralty jurisdiction, which the parties agree is the only possible ground for subject matter jurisdiction if the FSIA does not apply.

Subject Matter Jurisdiction

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). The FSIA generally recognizes the immunity of foreign states and their agencies and instrumentalities from the jurisdiction of American courts except under specific circumstances as provided in 28 U.S.C. §§ 1605-1607. *See* 28 U.S.C. §§ 1330, 1604. 28 U.S.C. § 1330(a) states that the district courts have jurisdiction "of any non-jury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. § 1604 provides, subject to existing international agreements, that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

Sections 1605 to 1607 set out several exceptions to the immunity from suit recognized by the FSIA. Particularly relevant to this action are the exceptions which provide that a foreign state:

> shall not be immune from the jurisdiction of the courts of the United States or of the States in any case — (1) in which the foreign state has waived its immunity either explicitly or by implication . . .; (2) in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(1) and (2). Transatlantic argues that both of the above exceptions to the FSIA apply here.

A. *Agency or Instrumentality*

To enjoy immunity from suit under the FSIA, SFTC first must qualify as a "foreign state" within the meaning of that act. 28 U.S.C. § 1603(a) defines "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." Subsection (b) of § 1603 defines "agency or instrumentality of a foreign state" as:

> any entity — (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor create under the laws of any third country.

"Once the defendant presents a prima facie case that it is a foreign sovereign, the plaintiff has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted." *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993). The ultimate burden of persuasion remains with the alleged foreign sovereign. *Id.*

Here, however, Transatlantic itself alleges that SFTC is an agency or instrumentality of China, and, alternatively, that it is a "state-owned, separate legal enterprise." (Complaint ¶ 3.) It is not seriously disputed that SFTC is an agency or instrumentality of China. These allegations are sufficient to establish, for purposes of this motion, that SFTC is a "foreign state" within the meaning of the FSIA.[2]

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[2] For this reason, Transatlantic's alternative argument that this court has admiralty jurisdiction over the action need not be addressed. Transatlantic concedes that admiralty jurisdiction is not available where the FSIA applies.

B. *Applicability of FSIA Exceptions*

1. *The Implied Waiver Exception*

Transatlantic argues that China (and thus SFTC) implicitly waived immunity by becoming a signatory to the Convention on the Recognition and Enforcement of Arbitral Awards (the "Convention"). Transatlantic argues that this case is controlled by the Second Circuit's decision in *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993). In *Seetransport*, a German company entered into a contract with a Romanian company that was an "agency or instrumentality" of the Romanian government. A dispute arose which was arbitrated in Paris pursuant to the contract. The Romanian company appealed to the Court of Appeals of Paris for annulment of the arbitration award, but the appeal was dismissed. The German company then filed an action in this court to enforce the arbitral award and to convert the decision of the Paris Court of Appeals into a United States judgment.

The Second Circuit held that the Romanian company had waived any sovereign immunity defense and explained that:

> when [the defendant] entered into a contract with [the plaintiff] that had a provision that any disputes would be submitted to arbitration, and then participated in an arbitration in which an award was issued against it, logically, as an instrumentality or agency of the Romanian Government — a signatory to the Convention — it had to have contemplated the involvement of the courts of any of the Contracting States in an action to enforce the award.

989 F.2d at 578-579. The court relied on the Convention's provision for recognition and enforcement of arbitration awards in any "Contracting state" — that is, any state that has ratified the Convention. *Id.*; *see Convention on the Recognition and*

Enforcement of Arbitral Awards, Article III, at 9 U.S.C. § 201. Because the defendant was a signatory to the Convention, the court held that by entering a contract containing an arbitration provision, it had implicitly waived sovereign immunity with respect to actions to confirm arbitration awards under the contract.

The court then dismissed the claim for enforcement of the arbitral award pursuant to the Convention, because it was barred by the statute of limitations. 989 F.2d at 581. The court also found, however, that the separate claim to convert the Paris Court of Appeals judgment into a United States judgment was "within the scope" of the waiver of sovereign immunity "because the cause of action is so closely related to the claim for enforcement of the arbitral award." 989 F.2d at 583. It therefore remanded the case for a determination of whether the Paris judgment was enforceable under New York CPLR § 5302.

By the same logic, Transatlantic argues, its claims are "closely related" to enforcement of the Hong Kong arbitral awards. China is a signatory of the Convention and therefore SFTC should be deemed to have waived its sovereign immunity defense with respect to those claims.

SFTC argues that the waiver principle of *Seetransport* cannot apply because SFTC was not a party to the Contracts, no arbitration award was rendered against it, and the judgments in this case are not "closely related" to a claim for enforcement of an arbitral award, as was the judgment in *Seetransport*. Transatlantic responds that VSL entered the Contracts on behalf of SFTC, that SFTC was the disclosed principal of VSL and that an agency relationship can bind a principal to an arbitration agreement. Thus, Transatlantic argues, the judgment relating to the arbitration agreement was in reality a judgment confirming an arbitration award, similar to the judgment in *Seetransport*. With respect to the other judgments,

Transatlantic contends that since the fraudulent transfers and liquidation were an attempt by SFTC and VSL to avoid the consequences of arbitration and the arbitration agreement, the judgments preventing that kind of enrichment based on fraud are related to the arbitration agreement. Therefore, Transatlantic argues, the waiver of sovereign immunity encompasses the claims on which all three judgments are based.

SFTC's argument against waiver is persuasive. In *Seetransport*, the plaintiff sought conversion of a foreign judgment that dismissed an action to vacate an arbitration award. As the Second Circuit noted, that judgment was effectively a judgment recognizing and enforcing the arbitration award. 989 F.2d at 582. In that case, however, the parties to the arbitration agreement were undisputed. There was no question that arbitration had been commenced, and the award rendered, against the defendant itself.

Here, by contrast, SFTC was not a signatory of the Contracts, Transatlantic did not initiate arbitration proceedings against SFTC, and no arbitration award was rendered against SFTC. As a result, even the Hong Kong judgment dated August 4, 1993 was not a simple confirmation of an arbitration award. The supposed "enforcement" of the arbitration award by the Hong Kong court required an inquiry into whether SFTC had an obligation to indemnify VSL. This inquiry went far beyond the simple confirmation of an arbitration award addressed by the Seetransport court.

Moreover, only one of the three judgments, the August 4, 1993 judgment, was based on an arbitration award. The second judgment was based on allegedly fraudulent transfers from VSL to SFTC before VSL was liquidated. The third judgment was based on Contracts for which no arbitration awards had been issued because of the liquidation of VSL.

These latter judgments are not "closely related" to enforcement of an arbitration agreement within the meaning of *Seetransport*.

2. *The Commercial Activity Exception*

The third prong of 28 U.S.C. § 1605(a)(2) provides that a foreign state is not immune from the jurisdiction of American courts in any case "in which the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." To invoke subject matter jurisdiction under this prong of the "commercial activity" exception, an action must be (1) based upon an act outside the territory of the United States; (2) that was taken in connection with a commercial activity of the defendant outside this country; and (3) that caused a direct effect in the United States. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992).

In *Weltover*, the Supreme Court held that the "direct effect" element was satisfied where a contract provided for the payment of funds to a New York bank, and that payment did not occur. "Because New York was . . . the place of performance for [defendant's] ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." 504 U.S. at 619. Citing *Weltover*, Transatlantic argues that the "commercial activity" exception applies because this action is based upon SFTC's breach of the Contracts — specifically, its failure to make the demurrage payments that were supposed to be paid, pursuant to the Contracts, to Transatlantic's New York bank.

Unlike the contract in *Weltover*, however, the Contracts in this case do not require the demurrage payments at issue to be made to plaintiff's New York bank account. The Contracts

provide that "freight" is to be paid in New York, but make no reference to the place of payment of demurrage. (Complaint ¶ 22 and Ex. 17.) There is no allegation in the complaint that VSL or SFTC failed to make any freight payments required by the Contracts. At oral argument, counsel for Transatlantic argued that demurrage payments are merely a type of freight payments. The Contracts, however, list "freight" and "demurrage" separately. Absent a contractual requirement that demurrage be paid in New York, the nonpayment of demurrage in New York is not a "direct effect" in the United States within the meaning of the FSIA. *See International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 12 (2d Cir. 1989) (no direct effect in United States where party directed that payment be made in New York, but payment in New York was not specifically required by contract). Thus, any nonpayment of demurrage by SFTC did not have a "direct effect" in the United States.

Furthermore, review of the Contracts' "Rider Clauses" attached to the complaint shows that the New York account that was designated for the payment of freight was not the ultimate place of payment. Rather, the designated New York account is merely a correspondent account, as Transatlantic acknowledges. (Complaint ¶ 22.) The Rider Clauses provide that freight is "payable to Northern Trust International, New York . . . in favor of Deutsch-Skandinavische Bank AG, Hamburg/Transatlantic Shiffahrtskontor GMBH, Hamburg, under telex advice to Deutsch-Skandinavische Bank AG, Hamburg." Addressing a similar situation involving a New York correspondent account in *International Housing*, *supra*, the Second Circuit observed that the New York bank's role "was that of a passive conduit indifferent to the nature or terms of the underlying transaction." 893 F.2d at 12.

For the foregoing reasons, the "commercial activity" exception to the FSIA is inapplicable and SFTC is entitled to sovereign immunity from this action.

Personal Jurisdiction

Even if one of the exceptions to the FSIA applied in this case, dismissal would be required because Transatlantic has not made a prima facie showing that this court has personal jurisdiction over defendant.

The Second Circuit has held that personal jurisdiction under the FSIA "requires . . . a due process scrutiny of the court's power to exercise its authority over a particular defendant." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).[3] "Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (citing *International Shoe Co. v. State of Wash.*, 326 U.S. 310, 316 (1945)) (internal quotations omitted). According to the Second Circuit, the "minimum contacts" test requires examination of the extent to which defendants have availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable, the inconvenience to defendants in litigating in the United States and the countervailing interest of the United States in hearing the suit. *Texas Trading*, 647 F.2d at 314. The Supreme Court has emphasized that minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities

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[3] Courts similarly apply due process "minimum contacts" analysis to the exercise of personal jurisdiction over defendants in admiralty cases. *See, e.g., United Trading Co. v. M.V. Sakura Reefer*, 1996 WL 374154, at *2 (S.D.N.Y. 1996); *Volkswagen De Mexico, S.A. v. Germanischer Lloyd*, 768 F.Supp. 1023, 1029 (S.D.N.Y. 1991). Thus, the same personal jurisdiction analysis would apply even if SFTC were not entitled to sovereign immunity and admiralty jurisdiction were invoked.

within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Jurisdiction may be based on contacts related to the suit in which jurisdiction is sought ("specific jurisdiction"), or general contacts with the forum not related to the suit ("general jurisdiction"). *Helicopteros Nacionales*, 466 U.S. at 414-415. However, "[w]here a claim against a foreign defendant does not arise out of the defendant's contacts with the forum, the exercise of personal jurisdiction over the defendant will be consistent with due process only if the defendant's contacts with the forum state are 'continuous and systematic.'" *Volkswagen De Mexico*, 768 F.Supp. at 1029 (citing *Helicopteros Nacionales*, 466 U.S. at 415-416); *see also Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir.), *cert. denied*, 519 U.S. 1006, 117 S.Ct. 508 (1996).

Plaintiff bears the burden of establishing the Court's personal jurisdiction over the defendant. *CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986); *Longwood Resources Corporation v. C.M. Exploration Co.*, 988 F.Supp. 750, 751 (S.D.N.Y. 1997); *Emmet, Marvin & Martin v. Maybrook, Inc.*, 1990 WL 209440, at *2 (S.D.N.Y. 1990). But where a motion brought under Rule 12(b)(2) is decided without an evidentiary hearing, plaintiffs need only make a prima facie showing that jurisdiction exists. *Longwood*, 988 F.Supp. at 751. All pleadings and affidavits are construed in the light most favorable to the plaintiffs, and all doubts are resolved in their favor. *CutCo*, 806 F.2d at 365; *Longwood*, 988 F.Supp. at 751. However, "legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F.Supp. 114, 122 (S.D.N.Y. 1988).

A. *Specific Jurisdiction*

Transatlantic argues that there is both specific and general jurisdiction over SFTC in this forum. With respect to specific jurisdiction, Transatlantic points to two contacts with the United States. First, under the Contracts, freight charges were payable to Transatlantic's account at its New York correspondent bank. The required freight payments were made to the New York bank prior to VSL's breach of the Contracts. (Complaint ¶ 22.) Second, according to the complaint, among the documents in the "Creditors' Voluntary Winding Up" of VSL/Harlifax was a "Statutory Declaration" which was executed before a British Consular Officer in New York. (*Id.* ¶ 36.) Transatlantic contends that this declaration was part of SFTC's fraudulent attempt to avoid liability to Transatlantic under the Contracts.

The execution of the "Statutory Declaration" in New York is of no jurisdictional significance. Transatlantic correctly points out (and SFTC does not dispute) that "actions relevant to the transaction by an agent on defendants' behalf" can be imputed to the defendant to support personal jurisdiction. *Texas Trading*, 647 F.2d at 314. However, there is no allegation that the liquidation of VSL/Harlifax, or the execution of the "Statutory Declaration" in New York, were acts within the scope of the purported principal-agent relationship between VSL/Harlifax and SFTC. Thus, the execution of the document in New York by VSL/Harlifax does not support the exercise of personal jurisdiction over SFTC.

In any event, even if these contacts were to be imputed to SFTC, they are not sufficient to support a finding of personal jurisdiction. First, the requirement that freight payments be made to another party's New York bank account does not provide an adequate basis for personal jurisdiction. The mere agreement to pay funds to a bank account in New York does not establish constitutionally sufficient minimum contacts

with New York. *L'Europeenne*, 700 F.Supp. at 125. Indeed, even a defendant's maintenance of a bank account in New York, absent special circumstances, does not satisfy the due process requirement of minimum contacts. *United Trading Co.*, 1996 WL 374154, at *5. And, the "Statutory Declaration" of VSL's liquidation that is alleged to have been executed in New York also is insufficient to support personal jurisdiction over SFTC. The complaint merely alleges that VSL/Harlifax executed a document in New York related to the company's voluntary liquidation in Hong Kong. There is no allegation that the document was filed with any governmental agency in New York, or that anything other than mere happenstance caused the document to be executed in New York. This does not amount to the purposeful availment "of the privilege of conducting activities" in New York "invoking the benefits and protections of its laws." *Burger King Corp.*, 471 U.S. at 475. Even when combined, these two contacts do not provide a basis for this court's exercise of personal jurisdiction over SFTC.

B. *General Jurisdiction*

Transatlantic also argues that SFTC has contacts in addition to those described above that give rise to general jurisdiction. Transatlantic maintains, and SFTC does not dispute, that contacts with the United States as a whole, rather than merely New York, should be evaluated to determine whether general personal jurisdiction in the United States exists. *See Texas Trading*, 647 F.2d at 314 (in action under FSIA, "the relevant area in delineating contacts is the entire United States, not merely New York").

Transatlantic alleges several general contacts by SFTC with the United States. First, Transatlantic alleges that SFTC owns 70% of a New York corporation called Shantra (N.Y.), Inc. ("Shantra New York"), and that Shantra New York is an "agent" of SFTC. Among the stated purposes of Shantra New

York, according to the company's certificate of incorporation, are to engage in the import and export business as principal or agent, to carry on the business of agents and to conduct a general agency business. The certificate of incorporation, however, does not indicate any particular entity or person for whom Shantra New York is to act as agent. Shantra New York has "intercompany connections" in the form of "trading connections" with SFTC, and its chairman and president "is or was" the general manager of SFTC. (Complaint ¶¶ 57-62.) Transatlantic further alleges that SFTC engages in worldwide commercial activities, has been credited with importing more than one third of Shanghai's total imports and has established a Sino-U.S. joint venture foreign trade company. (*Id.* ¶ 63.) SFTC, according to documents attached to the complaint, describes itself as a "comprehensive foreign trade enterprise" that produces millions of United States dollars in revenue each year and enjoys "worldwide" commercial relations with over 1,500 merchandisers throughout the world. (*Id.*, Ex. 42) Transatlantic argues that under these circumstances, it "defies credibility" to suggest that there are insufficient contacts with the United States.

These allegations do not make out a prima facie showing of the continuous and systematic general business contacts required to support general personal jurisdiction over SFTC. First, the presence of a subsidiary in the United States does not, standing alone, create personal jurisdiction. An additional factor, such as control of the local company or treatment as a mere department or agent of the parent, is necessary. *L'Europeenne*, 700 F.Supp. at 124. The vague allegations in the complaint that Shantra New York has "trading connections" with SFTC, and that among its stated purposes are to act as principal or agent in the import and export business and to conduct a general agency business, do not support an inference that Shantra New York is a mere department or agent of SFTC. Moreover, the conclusory allegation that Shantra New York is the agent of SFTC is inadequate on its face and is not

entitled to a "presumption of truthfulness." *Id.* at 122. Transatlantic has failed to allege facts supporting a prima facie showing of agency, and therefore the presence of Shantra New York is not sufficient for personal jurisdiction over SFTC.

For similar reasons, the vague allegations that SFTC is a major Chinese importer that engages in worldwide commercial activities and enjoys commercial relations with many other countries throughout the world are inadequate to show that SFTC has continuous and systematic contacts with the United States. These allegations do not connect SFTC to the United States, but only establish that it is an international trading company. Even if it were inferred from these allegations that SFTC has commercial relations with companies present in the United States, that fact would not lead to the conclusion that SFTC is engaged in the kind of continuous and systematic business contacts required by the Supreme Court to support general personal jurisdiction. *See Helicopteros Nacionales*, 466 U.S. at 418 (holding that "mere purchases, even if occurring at regular intervals, are not enough to warrant . . . assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions").

In sum, Transatlantic, a German company, has failed to present a prima facie showing that SFTC, an agency or instrumentality of the Chinese government, is subject to either specific or general personal jurisdiction in New York.

Conclusion

For the foregoing reasons, SFTC's motion to dismiss the complaint for lack of subject matter jurisdiction and personal jurisdiction is granted. Because the complaint is dismissed on jurisdictional grounds, I do not address SFTC's argument that the complaint fails to state a claim upon which relief can be granted.

SO ORDERED

Dated: New York, New York
March 13, 1998

/s/ Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRANSATLANTIC SHIFFAHRTSKONTOR GMBH,

Plaintiff,

- against -

SHANGHAI FOREIGN TRADE CORPORATION,

Defendant.

MEMORANDUM OPINION AND ORDER
96 Civ. 2893 (MGC)

APPEARANCES:

U.S. DISTRICT COURT
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S.D. OF N.Y.

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CEDARBAUM, J.

Plaintiff Transatlantic Shiffahrtskontor GmBh ("Transatlantic") moves pursuant to Local Civil Rule 6.3 for reconsideration of the March 13, 1998 opinion dismissing the complaint, and moves pursuant to Fed. R. Civ. P. 59(e) to alter the judgment that was entered on March 18, 1998. *See Transatlantic Shiffahrtskontor GmBh v. Shanghai Foreign Trade Corporation*, 996 F.Supp. 326 (S.D.N.Y. 1998). Reargument is appropriate under Local Civil Rule 6.3 and Fed. R. Civ. P. 59(e) only when the court has overlooked controlling decisions or factual matters put before it on the underlying motion, and which, had they been considered, might reasonably have altered the result reached by the court. *See Jack Frost Labs., Inc. v. Physicians & Nurses Mfg. Corp.*, 1996 WL 479246 (S.D.N.Y. Aug. 23, 1996).

Transatlantic argues that relief is warranted because of erroneous factual findings and errors of law with respect to subject matter jurisdiction and personal jurisdiction. For the reasons discussed below, the motion is granted.

I. *Personal Jurisdiction*

With respect to personal jurisdiction, Transatlantic argues that it should be given the opportunity to prove that defendant Shanghai Foreign Trade Corporation ("SFTC") is present in the United States through Shantra (New York), Inc., 70% of which is owned by SFTC. The March 13 opinion held that Transatlantic's vague and conclusory allegations of agency did not constitute a prima facie showing of personal jurisdiction in New York. 996 F.Supp. at 336.

Transatlantic draws attention to an uncontradicted factual assertion made after the conclusion of oral argument and not transcribed and thus not in the record of the case. After the conclusion of oral argument, Transatlantic's counsel advised the court that an employee of Shantra (New York) had

telephoned her on June 27, 1996 to request a copy of the complaint, and had stated that Shantra (New York) was SFTC's "New York representative." (March 31, 1998 Affirmation of Mary Ann C. Marlowe ¶ 4.) SFTC does not deny that Transatlantic's counsel made this assertion at oral argument.

Since this statement was not transcribed and appears nowhere else in the record, this important fact was not before me when I granted SFTC's motion to dismiss for lack of personal jurisdiction. Whether the conclusory allegations of the complaint were sufficient to state a prima facie case of personal jurisdiction was a very close question. Counsel's unrecorded assertion at oral argument, however, tips the scales in Transatlantic's favor and establishes a prima facie showing by Transatlantic of personal jurisdiction over SFTC. Accordingly, on reconsideration, I deny SFTC's motion to dismiss for lack of personal jurisdiction.

II. *Subject Matter Jurisdiction*

A. *The Implied Waiver Exception to the Foreign Sovereign Immunities Act*

Transatlantic had argued that China (and thus SFTC) had impliedly waived immunity under the Foreign Sovereign Immunities Act ("FSIA") by becoming a signatory of the Convention on the Recognition and Enforcement of Arbitral Awards (the "Convention"), relying on the Second Circuit's decision in *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993). The March 13, 1998 opinion distinguished *Seetransport* and held that there was no implied waiver in this case. 996 F.Supp. at 332-33. Transatlantic argues on this motion that the decision regarding implied waiver was incorrect, but offers no material facts or controlling authority that were overlooked in the March 13 opinion. Accordingly, the

motion for reconsideration is denied with respect to the implied waiver exception to the FSIA.

B. *The Commercial Activity Exception to the FSIA*

The third clause of 28 U.S.C. § 1605(a)(2) provides that a foreign state is not immune from the jurisdiction of American courts in any case "in which the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), the Supreme Court held that the "direct effect" element was satisfied where a contract provided for the payment of funds to a New York bank, and that payment did not occur. "Because New York was . . . the place of performance for [defendant's] ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 619, 112 S.Ct. 2160. Citing *Weltover*, Transatlantic argued that the "commercial activity" exception applies because this action is based upon SFTC's breach of the contractual obligation to make the demurrage payments that were to be paid to Transatlantic's New York bank.

The March 13 opinion stated that:

> Unlike the contract in *Weltover*, however, the Contracts in this case do not require the demurrage payments at issue to be made to plaintiff's New York bank account. The Contracts provide that "freight" is to be paid in New York, but make no reference to the place of payment of demurrage. (Complaint ¶ 22 and Ex. 17.) There is no allegation in the complaint that VSL or SFTC failed to make any freight payments required by the Contracts. . . . Absent a contractual requirement that

> demurrage be paid in New York, the nonpayment of demurrage in New York is not a "direct effect" in the United States within the meaning of the FSIA.

996 F.Supp. at 333.

The March 13 opinion also stated that there was no "direct effect" in any event because the New York account that was designated for the payment of freight was not the ultimate place of payment, but merely a correspondent account, citing *International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 12 (2d Cir. 1989) (in similar situation involving correspondent account, New York bank's role "was that of a passive conduit indifferent to the nature or terms of the underlying transaction"). 996 F.Supp. at 333.

Transatlantic argues that it was erroneous to find that the Contracts required only freight payments and not the payment of demurrage in New York. Transatlantic points to Exhibit 17 to the Amended Complaint, which appears to contemplate payment of any demurrage together with part of the freight payments payable in New York. Transatlantic also argues that the March 13 opinion incorrectly stated that the Amended Complaint did not allege that defendant failed to make any freight payments required by the Contracts. Transatlantic correctly notes that ¶ 77 of the Amended Complaint states that "Defendant failed to pay the five (5) percent freight balance pursuant to the Contracts and demurrage costs when they accrued." The March 13 opinion overlooked the allegations in the complaint that the defendant failed to make payments that were required to be made in New York.

Accordingly, the only basis for holding that the failure to make payments under the Contracts was not a "direct effect" under the FSIA is the nature of the New York account, which was merely a correspondent account. Standing alone, this fact does not permit the conclusion that the failure to make payment in New York was not a "direct effect" in New York.

See Hanil Bank v. PT. Bank Negara Indonesia, 148 F.3d 127, 133 (2d Cir. 1998) ("direct effect" requirement "only requires an effect in the United States that follows as an immediate consequence of the defendant's actions overseas"). Thus, on reconsideration, I hold that the failure to make contractually required payments to Transatlantic's New York account was a "direct effect" in the United States within the meaning of the FSIA.

Reconsideration of the "direct effect" question requires me to address the parties' other argument with respect to the FSIA's commercial activity exception. In its motion to dismiss for lack of subject matter jurisdiction, SFTC argued that the commercial activity exception does not apply because this action is not "based upon" the alleged failure to pay demurrage in New York, as required by the FSIA. *See* 28 U.S.C. § 1605(a)(2). Rather, SFTC argued, the action is based upon the enforceability of three default judgments entered against SFTC by the Hong Kong courts. SFTC cited *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), in which the Supreme Court addressed the meaning of "based upon" in section 1605(a)(2). There, the Court stated that "the phrase ['based upon'] is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357. *Nelson*, which involved the first clause of section 1605(a)(2), held that the plaintiff's claims for false imprisonment and battery in Saudi Arabia were not "based upon" the Saudi government's recruitment of him in the United States. *Id.* at 358. *See also Drexel Burnham Lambert Group Inc. v. Committee of Receivers for A.W. Galadari*, 12 F.3d 317, 330 (2d Cir. 1993) (applying *Nelson* to third clause of section 1605(a)(2)), *cert. denied*, 511 U.S. 1069 (1994). SFTC argued that the elements of Transatlantic's claims to enforce the Hong Kong judgments are the existence of a foreign country judgment which is final, conclusive and enforceable where rendered (citing N.Y.C.P.L.R. § 5302), and proof that the judgments were properly assigned to Trans-

atlantic — not upon any acts of SFTC that are alleged to have had a "direct effect" in the United States. SFTC further argued that in any event, the underlying claims in the Hong Kong court were based upon an indemnification agreement between SFTC and its alleged agent, VSL.

Neither *Nelson* nor *Drexel Burnham Lambert* involved an action to enforce a foreign judgment in the United States, and neither case held that for purposes of the FSIA, such an action is "based upon" only the enforceability of the foreign judgment and not conduct underlying the foreign judgment. Because Transatlantic's action seeks to enforce foreign judgments, it is appropriate to consider the conduct upon which those judgments were based. According to the complaint, the Hong Kong judgments were based upon SFTC's failure to meet its obligations under the Contracts, including its failure to make contractually required payments to Transatlantic's New York bank account through its agent, VSL. Under those circumstances, the complaint sets out sufficient allegations to establish that this action is based upon conduct of SFTC outside the United States in connection with a commercial activity that caused a direct effect in the United States.

Finally, SFTC argued — in its original motion to dismiss — that Hong Kong judgments cannot be enforced under Article 53 of the New York Civil Practice Law and Rules because Hong Kong is not recognized as a foreign state by the United States government. SFTC cited district court cases which have held that Hong Kong was not a "foreign state" for purposes of diversity jurisdiction. *See Matimak Trading Co. v. Khalily*, 936 F.Supp. 151, 153 (S.D.N.Y. 1996), *aff'd*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, --- U.S. ---, 118 S.Ct. 883 (1998).

An action may be brought under the FSIA to enforce a foreign judgment pursuant to the C.P.L.R. *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 583 (2d Cir. 1993) (holding

that recognition of foreign judgments is governed by state law, and remanding for application of C.P.L.R. provisions on enforcement of foreign judgments). New York C.P.L.R. § 5303 provides that "a foreign country judgment . . . is conclusive between the parties to the extent that it grants or denies recovery of a sum of money." C.P.L.R. § 5301 defines "foreign country judgment" as "any judgment of a foreign state," and defines "foreign state" as "any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone or the Trust Territory of the Pacific Islands." New York courts have enforced judgments of Hong Kong courts under C.P.L.R. Article 53, although without addressing the argument that Hong Kong is not recognized as a foreign state by the United States government. *See Overseas Trust Bank Ltd. v. Poon*, 181 A.D.2d 762, 763, 581 N.Y.S.2d 92, 93 (2d Dep't 1992); *Jeuro Container Transp. (HK) Ltd. v. Velco Enter., Ltd.*, N.Y.L.J., Dec. 16, 1994, at 37 (Sup. Ct. Dec. 16, 1994). Regardless of whether Hong Kong is recognized as a foreign state by the United States government, however, it meets the definition of foreign state in Article 53. The Hong Kong judgments on which Transatlantic sues are foreign country judgments within the meaning of C.P.L.R. §§ 5301 and 5303.

CONCLUSION

For the foregoing reasons, Transatlantic's motion for reconsideration is granted, and on reconsideration, SFTC's motion to dismiss the complaint is denied. The Clerk is directed to vacate the judgment entered on the March 13 opinion.

SO ORDERED

Dated: New York, New York
November 16, 1998

/s/ Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Each motion should be accompanied by a supporting affidavit with statement of issues. (Local Rule 27(a)) Include brief statement of facts with page references to the moving papers.

Docket No. 98-9643

TRANSATLANTIC SHIFFAHRTSKONTOR GMBH,

Plaintiff/Appellee/Petitioner,

v.

SHANGHAI FOREIGN TRADE CORPORATION,

Defendant/Appellant.

MOTION INFORMATION FORM

Motion for Leave to File Addendum to Petition for Re-hearing Brief

MOTION BY: (*Name, address and tel. no. of law firm and of attorney in charge of case)*

KEANE & MARLOWE
Mary Ann C. Marlowe, Esq.
1200 Tices Lane, Suite 102
East Brunswick, NJ 08816
(732) 846-1000

Has consent of opposing counsel:

A. been sought? (X) Yes ( ) No
B. been obtained? (X) Yes ( ) No
(partial consent)

Has service been effected? (X) Yes ( ) No
(see enclosed proof of service)

Is oral argument desired? ( ) Yes ( ) No
(*Substantive motions only*)

Requested return date: _____
(*See Second Circuit Rule 27(b).)*

Has argument date of appeal been set:

A. by scheduling order? (X) Yes ( ) No
B. by firm date/argument notice? (X) Yes ( ) No
C. If yes, enter date: October 7, 1999

Judge or agency whose order is being appealed:

_____

OPPOSING COUNSEL: (*Name, address and tel. no. of law firm and of attorney in charge of case)*

MCDERMOTT, WILL & EMERY
Elliot Silverman, Esq.
50 Rockefeller Plaza
New York, New York 10020
(212) 547-5400

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below?
(*See F.R.A.P. Rule 8.)* ( ) Yes ( ) No n/a

Any previous request for similar relief made to the 2nd Circuit? ( ) Yes ( ) No n/a

Would expedited appeal eliminate need for this motion?
( ) Yes ( ) No n/a

If no, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ( ) Yes ( ) No n/a

Brief statement of the relief requested: LEAVE TO FILE ADDENDUM TO PETITION FOR REHEARING ON BEHALF OF PLAINTIFF/APPELLEE.

By: /s/ Mary Ann C. Marlowe
(*Signature of Attorney*)

Signed name must be printed beneath:

Mary Ann C. Marlowe

TRANSATLANTIC SHIFFAHRTSKONTOR GMBH
Appearing for: (*Name of Party*)

Appellant or Petitioner: ( ) Plaintiff (X) Defendant

Appellee or Respondent: (X) Plaintiff ( ) Defendant

Date: March 9, 2000

ORDER

BEFORE:

HON. DENNIS JACOBS,
HON. GUIDO CALABRESI,
HON. SONIA SOTOMAYOR, C.JJ.

IT IS HEREBY ORDERED that the motion be and it hereby is granted insofar as it wishes to add our opinion; denied with respect to any other material.

FOR THE COURT
Roseann B. MacKechnie, Clerk

By: /s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

JUL 19 2000
Date

UNITED STATES COURT
OF APPEALS FOR THE
SECOND CIRCUIT
FILED JUL 19 2000
Roseann B. MacKechnie, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

Transatlantic Shiffahrtskontor GMBH,

Plaintiff,

- against -

ORDER
96 Civ. 2893 (MGC)

Shanghai Foreign Trade Corporation,

Defendant.

----------X

CEDARBAUM, J.

This action is dismissed for lack of jurisdiction in accordance with the opinion of the Court of Appeals.

SO ORDERED.

Dated: New York, New York
September 20, 2000

/s/ Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title.

(Added Pub.L. 94-583, § 2(a), Oct. 21, 1976, 90 Stat. 2891.)

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

1976 Acts. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94-583, set out as a note under section 1602 of this title.

CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

Sec.

1602. Findings and declaration of purpose.
1603. Definitions.
1604. Immunity of a foreign state from jurisdiction.
1605. General exceptions to the jurisdictional immunity of a foreign state.
1606. Extent of liability.
1607. Counterclaims.
1608. Service; time to answer default.[1]
1609. Immunity from attachment and execution of property of a foreign state.
1610. Exceptions to the immunity from attachment or execution.
1611. Certain types of property immune from execution.

([1] So in original. Does not conform to section catchline.)

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1976 Acts. House Report No. 94-1487, *see* 1976 U.S. Code Cong. and Adm. News, p. 6604.

Effective Dates

1976 Acts. Section 8 of Pub.L. 94-583 provided that: "This Act [enacting this chapter and section 1330 of this title, amending sections 1332, 1391, and 1441 of this title, and enacting provisions set out as notes under this section] shall take effect ninety days after the date of its enactment [Oct. 21, 1976]."

Separability of Provisions

Section 7 of Pub.L. 94-583 provided that: "If any provision of this Act [enacting this chapter and section 1330 of this title, amending sections 1332, 1391, and 1441 of this title, and enacting provisions set out as notes under this section and section 1 of this title] or the application thereof to any foreign state is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable."

Short Title

1976 Acts. Authorization to cite Pub.L. 94-583, which enacted this chapter, as the "Foreign Sovereign Immunities Act of 1976," *see* section 1 of Pub.L. 94-583, set out as a note under section 1 of this title.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or

an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1976 Acts. House Report No. 94-1487, *see* 1976 U.S. Code Cong. and Adm. News, p. 6604.

Effective Dates

1976 Acts. Section effective 90 days after Oct. 21, 1976, *see* section 8 of Pub.L. 94-583, set out as a note under section 1602 of this title.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1976 Acts. House Report No. 94-1487, *see* 1976 U.S. Code Cong. and Adm. News, p. 6604.

References in Text

The time of enactment of this Act, referred to in text, probably means the time of enactment of Pub.L. 94-583, which was approved on Oct. 21, 1976.

Effective Dates

1976 Acts. Section effective 90 days after Oct. 21, 1976, *see* section 8 of Pub.L. 94-583, set out as a note under section 1602 of this title.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of prop-

erty, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or

provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or

cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought

to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)—

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.—

(1) In general.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of

action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892, and amended Pub.L. 100-640, § 1, Nov. 9, 1988, 102 Stat. 3333; Pub.L. 100-669, § 2, Nov. 16, 1988, 102 Stat. 3969; Pub.L. 101-650, Title III, § 325(b)(8), Dec. 1, 1990, 104 Stat. 5121; Pub.L. 104-132, Title II, § 221(a), Apr. 24, 1996, 110 Stat. 1241; Pub.L. 105-11, Apr. 25, 1997, 111 Stat. 22.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1976 Acts. House Report No. 94-1487, *see* 1976 U.S. Code Cong. and Adm. News, p. 6604.

1988 Acts. House Report No. 100-823, *see* 1988 U.S. Code Cong. and Adm. News, p. 4511.

1990 Acts. Senate Report No. 101-416, House Report Nos. 101-123, 101-512, 101-514, 101-734, and 101-735, and Statement by President, *see* 1990 U.S. Code Cong. and Adm. News, p. 6802.

1996 Acts. Senate Report No. 104-179 and House Conference Report No. 104-518, *see* 1996 U.S. Code Cong. and Adm. News, p. 924.

References in Text

Section 101(a)(22) of the Immigration and Nationality Act, referred to in subsec. (a)(7)(B)(ii), is classified to section 1101(a)(22) of Title 8, Aliens and Nationality.

The Ship Mortgage Act, 1920, referred to in subsec. (d), is section 30 of Act June 5, 1920, c. 250, 41 Stat. 1000, as amended, which was classified generally to chapter 25 (section 911 *et seq.*) of the Appendix to Title 46, Shipping, and was repealed by Pub.L. 100-710, Title I, § 106(b)(2), Nov. 23, 1988, 102 Stat. 4752, and reenacted by section 102(c) thereof as chapters 301 and 313 of Title 46, Shipping.

Section 3 of the Torture Victim Protection Act of 1991, referred to in subsec. (e)(1), is section 3 of Pub.L. 102-256, Mar. 12, 1992, 106 Stat. 73, set out in a note under section 1350 of this title.

Effective Dates

1997 Acts. Section 1 of Pub.L. 105-11 provided in part that the amendment of subsec. (a)(7)(B)(ii) by Pub.L. 105-11 is effective with respect to any cause of action arising before, on, or after April 25, 1997.

1996 Acts. Section 221(c) of Pub.L. 104-132 provided that: "The amendments made by this subtitle [amending this section and section 1610 of this title] shall apply to any cause of action arising before, on, or after the date of the enactment of this Act [Apr. 24, 1996]."

1988 Acts. Section 3 of Pub.L. 100-640 provided that: "The amendments made by this Act [amending this section and section 1610 of this title] shall apply to actions commenced on or after the date of the enactment of this Act [Nov. 9, 1988]."

1976 Acts. Section effective 90 days after Oct. 21, 1976, *see* section 8 of Pub.L. 94-583, set out as a note under section 1602 of this title.

Civil Liability for Acts of State Sponsored Terrorism

Pub.L. 104-208, Div. A, Title I; § 101(c) [Title V, § 589], Sept. 30, 1996, 110 Stat. 3009-172, provided that:

"**(a)** An official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 [section 2405(j) of the Appendix to Title 50, War and National Defense] while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code [subsec. (a)(7) of this section] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7) [subsec. (a)(7) of this section].

"**(b)** Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) [subsecs. (f) and (g) of this section] shall also apply to actions brought under this section. No action shall be maintained under this action [SIC] if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States."

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages, except any action under section 1605(a)(7) or 1610(f); if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in

nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1976 Acts. House Report No. 94-1487, *see* 1976 U.S. Code Cong. and Adm. News, p. 6604.

Effective Dates

1976 Acts. Section effective 90 days after Oct. 21, 1976, *see* section 8 of Pub.L. 94-583, set out as a note under section 1602 of this title.

KEANE & MARLOWE
300 Park Avenue
17th Floor
New York, New York 10022
Mary Ann C. Marlowe (0723)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRANSATLANTIC SHIFFAHRTSKONTOR GMBH,	:	
Plaintiff,	:	96 Civ. 2893 (MGC)
- against -	:	**AMENDED COMPLAINT**
SHANGHAI FOREIGN TRADE CORPORATION,	:	
Defendant.	:	

The Plaintiff, by its attorneys, KEANE & MARLOWE, complaining of the Defendant, alleges, upon knowledge with respect to itself and its own acts and upon knowledge and/or information and belief as to all other matters, as follows:

NATURE OF THIS ACTION

1. This action arises out of three judgments issued by the Supreme Court of Hong Kong, High Court, against the Defendant, SHANGHAI FOREIGN TRADE CORPORATION, in favor of the Plaintiff, TRANSATLANTIC SHIFFAHRTSKONTOR GMBH. The judgments reflect various liabilities of the Defendant to the Plaintiff arising out of and/or relating to of a series of individual voyage charter parties and/or contracts of affreightment. The Defendant has refused to comply with its obligations under these judgments and Plaintiff, accordingly, seeks to convert said judgments of the Supreme

Court of Hong Kong, High Court, to a United States judgment and to recover same together with pre and post-judgment interest, taxed costs relating to the Hong Kong arbitration and liquidation proceedings, currency exchange fluctuation damages, costs incurred in prior attempts to enforce these judgments, as well as costs and fees related to the instant action, including attorneys' fees.

PARTIES

2. At all times mentioned and relevant hereto, the Plaintiff, TRANSATLANTIC SHIFFAHRTSKONTOR GMBH ("TASK") was and is a foreign corporation duly organized and existing pursuant to the laws of the Federal Republic of Germany.

3. At all times mentioned and relevant hereto, the Defendant, SHANGHAI FOREIGN TRADE CORPORATION ("SHANTRA SHANGHAI"), was and is an agency or instrumentality of a foreign state, namely the People's Republic of China ("PRC") within the meaning of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1603. Alternatively, SHANTRA SHANGHAI is a state-owned, separate legal enterprise which enjoys civil rights, assumes civil obligations, and is capable of suing and being sued in its own name and bearing independent legal liability.

JURISDICTION AND VENUE

4. This Court has subject matter and personal jurisdiction over this action pursuant to 28 U.S.C. §1330 *et seq.*, 28 U.S.C. §1605, and 9 U.S.C. §201 *et seq.* Additionally, since the judgments, in part, are based upon various breaches of maritime contracts, this is a case of admiralty and maritime jurisdiction within the meaning of Rule 9 (h) of the Federal Rules of Civil Procedure and 28 U.S.C. §1333. The nonadmiralty and maritime claims are subject to this Court's supplemental jurisdiction pursuant to 28 U.S.C. §1367.

5. Venue is proper in this district pursuant to 28 U.S.C. §1391.

BACKGROUND

The Creation of Vincor Shipping Co. Ltd. And its Role as Defendant's Agent

6. On or about July 26, 1984, SHANTRA SHANGHAI, Shanghai Municipal Metallurgical Bureau, and Vincor Limited of Hong Kong entered into a "Cooperation Agreement" pursuant to which two joint venture companies were established. (Copy of July 26, 1984 Cooperation Agreement attached hereto as Exh. "1")

7. One of the two joint venture companies, Vincor Shipping Company Limited ("VSL"), was formed, *inter alia*:

(1) to sell and purchase old vessels and scrap vessels, to act as agent for all provinces and municipalities and throughout the country . . . ;

(2) to engage in the chartering out of vessels and to charter vessels to participate in maritime transport; . . .[and]

(3) to engage in maritime transport. . . .

(*see* p. 2 sec. 3 of Exh. "1")

8. Mr. Ku Kam (a/k/a Gu Gan), the Deputy General Manager of the Import Division of SHANTRA SHANGHAI, executed the Cooperation Agreement on behalf of SHANTRA SHANGHAI. Mr. Yang Hejun and Mr. Chan Nai-Kang executed the Cooperation Agreement on behalf of Shanghai Municipal Metallurgical Bureau and Vincor Limited of Hong Kong, respectively. (*See* p. 7 of Exh. "1")

9. The Board of Directors of VSL was to be comprised of six persons with each of the three joint venture partners

appointing two individuals. One of SHANTRA SHANGHAI's two appointees was to be designated as Chairman of the Board of VSL, while the other appointee was to be named as a director. (*See* p. 3, Sec. 4 of Exh. "1")

10. On or about August 21, 1985, Mr. Ku Kam, Deputy General Manager of the Import Division of SHANTRA SHANGHAI, was elected Director and Chairman of VSL.

11. Pursuant to the Cooperation Agreement, SHANTRA SHANGHAI acted as the principal and beneficial owner of VSL. VSL, in turn, acted as an agent of SHANTRA SHANGHAI. (Copy of Sept. 4, 1991 transcript of testimony of Mr. Ku Kam at 9, lines 10-13 attached hereto as Exh. "2")

12. As agent of SHANTRA SHANGHAI, VSL was authorized by SHANTRA SHANGHAI to negotiate shipping deals, to sell and purchase old or scrap vessels, engage in the chartering and sub-chartering of vessels, issue bills of lading, as well as generally engage in maritime transport. (Copies of Nov. 5, 1983 letter of authorization attached hereto as Exh. "3"; Oct. 5, 1984 letter from VSL to SHANTRA SHANGHAI enclosing copy of charter party dtd. September 18, 1984 attached hereto as Exh. "4"; telexes dtd. Jan. 24, 1985 and March 13, 1985 noting authorization given to VSL by SHANTRA SHANGHAI to fix ships attached hereto as Exhs. "5" and "6"; letter dtd. April 15, 1985 identifying VSL as SHANTRA SHANGHAI's "shipping arm" attached hereto as Exh. "7")

13. Beginning in 1984, TASK contracted to charter its vessels with VSL, which was described to TASK as the agent of SHANTRA SHANGHAI — one of China's leading importers. (Copies of telexes dtd. May 15, 1985 and June 1, 1985 from VSL to TASK attached hereto as Exhs. "8" and "9")

14. An initial or test shipment of 10,000 metric tons of steel both from Hamburg and Norway to Shanghai was arranged

by TASK pursuant to a voyage charter party between TASK and VSL. (Copy of cover page of Sept. 18, 1984 charter party attached hereto as Exh. "10")

15. Thereafter, in 1984 and 1985, TASK operated twenty one vessels and transported 350,000 metric tons of various cargos to Shanghai. All twenty one vessels were the subject of individual voyage charter parties and/or contracts of affreightment ("the Contracts") between TASK and VSL. (Copies of cover pages of the contracts attached hereto as Exh. "11")

16. At all times and for all of the vessels chartered by VSL from TASK, VSL was authorized by and did, in fact, act as the agent for the purchaser and receiver of the cargoes, SHANTRA SHANGHAI. (*See* Exh. "2" at 7, lines 19-21; at 12, lines 14-20; at 22, lines 14-19; and at 26, lines 1-10; Exh. "5"; copy of Jan. 28, 1985 telex noting remittance due from SHANTRA SHANGHAI attached hereto as Exh. "6")

17. SHANTRA SHANGHAI was the party for whom VSL entered into the Contracts with TASK, was the purchaser and receiver of goods imported into the People's Republic of China, and was the ultimate beneficiary of VSL/TASK contracts. As such, SHANTRA SHANGHAI assumed the final responsibility for same. (Copy of telex dated July 25, 1985 from VSL to TASK attached hereto as Exh. "12"; *see also*, Exh. "2" at 24, lines 9-14)

18. With respect to each of the charter parties arranged by the VSL for and on behalf of SHANTRA SHANGHAI, it was an implied term of the principal/agent relationship that existed between VSL and SHANTRA SHANGHAI, that the latter would indemnify VSL in respect of all expenses, costs, losses and liabilities that might be incurred by VSL arising out of the said charter parties, the said term being implied by law.

19. VSL negotiated on behalf of SHANTRA SHANGHAI, but SHANTRA SHANGHAI specifically approved all the important provisions of the Contracts between VSL and TASK, including the arbitration clauses, freight and demurrage rates on all Contracts.

20. The VSL freight invoices to SHANTRA SHANGHAI, which received a 2.5% "address" commission on all the contracts, indicate that VSL was the agent for SHANTRA SHANGHAI and that the charters were "for the account and risk" of SHANTRA SHANGHAI. (Copies of VSL invoices to SHANTRA SHANGHAI dtd. Jan. 30, 1985, Apr. 15, 1985 and July 2, 1985 attached hereto as Exhs. "13," "14" and "15," respectively)

21. VSL also expressly represented to TASK and various third parties that VSL was acting on behalf of SHANTRA SHANGHAI. (Exhs. "5"; copy of March 13, 1985 telex from VSL to Siderurgica attached hereto as Exh. "16")

The Terms of the Charter Parties and the Parties' Performance Thereunder

22. All of the Contracts and related invoices provided for the payment of freight, demurrage and despatch in United States Dollars. Pursuant to various "Rider Clauses" of the Contracts, freight payments were to be and were, in fact, made payable to TASK's New York correspondent bank, Northern Trust International, New York. (Copies of freight payment clause extracts of charter parties and various payment advices attached hereto as Exhs. "17" and "18", respectively)

23. The resolution of all disputes under all of the Contracts was agreed by the parties to be via Hong Kong arbitration proceedings in accordance with the laws of Hong Kong. (Copies of arbitration clause extracts from charter parties attached hereto as Exh. "19")

24. During the period 1984 and 1985, the port of Shanghai was severely congested. As a result of that congestion, VSL incurred substantial demurrage in favor of TASK pursuant to the terms of the Contracts. A majority of the ships were delayed beyond the laytime as specified in the Contracts with some delays as long as six weeks.

25. According to an internal agreement between SHANTRA SHANGHAI and VSL, SHANTRA SHANGHAI was also to pay VSL for any and all of the demurrage incurred. Funds received by VSL from SHANTRA SHANGHAI for potential demurrage were to be set aside in a "freight difference" account. (Copies of Price Waterhouse "system notes" attached hereto as Exhs. "20" and "21"; copy of memo dtd. Aug. 14, 1989 from B. Cheung to D. Jordan re "freight difference" attached hereto as Exh. "22")

26. SHANTRA SHANGHAI failed to pay said demurrage and VSL, in turn, failed to remit same to TASK.

The Arbitration and Liquidation Proceedings

27. Between 1985 and 1989, TASK pursued claims for demurrage and other claims against VSL under all twenty one contracts via arbitration proceedings in Hong Kong. The arbitration panel appointed for all claims was the same. (Copy of Baker & Mackenzie Statement of Claim submitted to the Supreme Court of Hong Kong at 4, ¶ 8(i) and Schedule II thereto attached as Exh. "23" hereto; copy of Nov. 7, 1988 memo from Deacons to N. J. Binnersley attached hereto as Exh. "30")

28. SHANTRA SHANGHAI retained Holman, Femurek & Willan, Solicitors ("HF&W") to participate in the defense of TASK's claims. (Copies of Aug. 22, 1985 and Oct. 4, 1985 letters from HF&W to VSL attached hereto as Exhs. "38," "24" and "25," respectively)

29. During 1986, VSL was well aware it would likely be held liable on the disputed Contracts and attempted to delay the arbitration proceedings by objecting to the appointment of one of the arbitrators. (Copy of Nov. 10, 1986 letter from Deacons to VSL attached hereto as Exh. "26")

30. In November 1987, VSL, which was incorporated as a limited company under the Companies Ordinance Act of Hong Kong, changed its name to Harlifax Limited ("VSL/ Harlifax").

31. This name change was effectuated just before the issuance of a December 1987 interim arbitration award in TASK's favor relating to twelve of the charter party disputes. The Interim Award was based on various admissions of liability that VSL had made in its Points of Defense submitted to the arbitration panel. (*See* "Schedule III annexed to Exh. "23" hereto.) The Interim Award was reduced to a judgment of the High Court of Hong Kong on March 10, 1988 and was ultimately satisfied.

32. Harlifax Limited is a successor in interest to the liabilities of VSL.

33. Hearings on the disputed Contracts were held in Hong Kong before a tribunal comprised of three arbitrators between December 12th and 15th, 1988.

34. In January 1988 SHANTRA SHANGHAI was split into three companies: Shanghai Foreign Trade Corporation, Shanghai Foreign Trade Enterprises Corporation, and Shanghai Overseas Enterprises Corporation. The first of the three companies, Shanghai Foreign Trade Corporation, maintained the same name as its predecessor company and remained a state-owned entity (hereinafter both the predecessor and subsequent companies referred to as "SHANTRA SHANGHAI").

35. On December 30, 1988, the directors of VSL/Harlifax declared voluntary liquidation in Hong Kong on the advice of

counsel and in anticipation of an adverse award in the said arbitration proceedings. (Copy of July 26, 1988 letter from Deacons to VSL/Harlifax recommending liquidation in view of potential adverse award attached hereto as Exh. "27"; copy of Nov. 7, 1988 memo (at 4) from Deacons to N.J. Binnersley attached hereto as Exh. "28")

36. The documents included in the Creditors' Voluntary Winding Up included a Statutory Declaration which was executed before a British Consular Officer in New York. (Copy of internal Deacons memo dated Sept. 14, 1989 attached hereto as Exh. "29"; copy of Nov. 15, 1988 letter from Decons to Harlifax attached hereto as Exh. "30")

37. VSL made three transfers of capital to SHANTRA SHANGHAI between October 1986 and November 1988.

38. TASK was the only major creditor affected by the liquidation of VSL/Harlifax. All of the debts due to VSL's related companies were repaid in full before the commencement of the winding up.

39. The declaration of voluntary liquidation by VSL/Harlifax, when it was apparent that arbitral and judicial proceedings would confirm VSL/Harlifax indebtedness to TASK, operated as a fraud upon TASK.

40. On June 30, 1989 the Hong Kong arbitration tribunal issued a unanimous award in TASK's favor which disposed of some of TASK's remaining claims as follows:

A. M/V VIVACITY charter party dated April 30, 1984, for the two load ports of Antwerp and Cardiff: U.S. $138,054.95;

B. Contract of Affreightment dated January 16, 1985 for the vessels JOVIALITY, APHRODITE, MAGIC SKY and WORLD AJAX in the amount of U.S. $473,294.30.

41. The total amount awarded TASK by the arbitrators, including interest but exclusive of costs, was U.S. $793,984.91 (Copy of June 30, 1989 Award at p. 38 attached hereto as Exh. "31")

42. Costs of the arbitral tribunal, as well as sealed allocators relating to the June 1989 Final Award and December 1987 Interim Awards in the amounts of HK $220,797.00 and 301,417.70, respectively, were also taxed against VSL. (Copy of February 9, 1994 letter to TASK attached hereto as Exh. "32")

43. Upon the application of TASK, the Supreme Court of Hong Kong, High Court, appointed Deloitte Touche Tomahatsu as liquidators in March 1991 to investigate the questionable circumstances surrounding the voluntary liquidation of VSL/Harlifax.

44. The liquidators applied to the court under Sec. 221 of the Hong Kong Companies Ordinance, for an examination of the former directors and officers as well as the solicitors and auditors of VSL/Harlifax.

45. Based on the information received during the hearings, and as a result of various investigations, the liquidators commenced three legal proceedings against SHANTRA SHANGHAI and the directors of VSL/Harlifax.

46. After VSL/Harlifax went into liquidation, TASK filed a proof of debt dated May 11, 1990 listing its outstanding claims. SHANTRA SHANGHAI also filed a proof of debt, which was rejected for lack of support by the liquidators. (Copy of Notice of Rejection attached hereto as Exh. "33")

47. The remaining eighteen of the twenty-one Contracts had the same essential terms as the Contracts upon which the June 30, 1989 award was made. The ultimate judgment was, accordingly, adjudicated by the liquidators on the same basis as the arbitration award.

48. The liquidators relied, in part, upon the assistance of Richards Butler, solicitors who specifically specialize in shipping and admiralty law. Richards Butler was retained by the liquidators to advise and assist in the adjudication of TASK's claims.

49. SHANTRA SHANGHAI was properly served with the initiating Summons and Complaint (Copies of October 3 and October 6, 1992 notices of service effectuated by Shanghai Maritime Court attached hereto as Exhs. "34" and "35," respectively)

50. No appearance was entered by SHANTRA SHANGHAI and default judgments were rendered.

51. Since VSL/Harlifax entered into the Contracts with TASK as SHANTRA SHANGHAI's agent, SHANTRA SHANGHAI, which was found by the liquidators and Richards Butler to be the principal of VSL/Harlifax, was adjudged liable and directed to indemnify VSL/Harlifax for all liabilities arising under the Contracts.

52. Three judgments in the legal proceedings were obtained against SHANTRA SHANGHAI in the name of VSL/Harlifax (In Liquidation). The judgments related to all of VSL/Harlifax's liabilities to TASK arising out of the remaining Contracts, including those amounts reflected in the June 30, 1989 Award. The details of the Judgments are as follows:

A. August 4, 1993 in the amount of HK $ 4,771,886.57 (U.S. $611,349.25, where U.S. $1 = HK $7.8055), plus interest thereon at the Hong Kong judgment rate from October 30, 1991 until payment. This judgment represents the principal amount awarded by the arbitrators on June 30, 1989. (Copy of Aug. 4, 1993 Judgment attached hereto as Exh. "36")

B. September 24, 1993 in the amount of HK $ 1,398,-052.00 (U.S. $179,111.14, where U.S. $1 = HK

$7.8055), plus interest thereon at the rate of 9.5% per annum from February 19, 1992 until September 24, 1993, plus fixed costs totaling HK $ 1,680.00 (U.S. $215.23, where U.S. $1 = HK $7.8055). Interest thereafter at the Hong Kong judgment rate until payment. This judgment represents the monies transferred from VSL/Harlifax to SHANTRA SHANGHAI. (Copy of Sept. 24, 1993 Judgment attached hereto as Exh. "37")

C. May 31, 1994 in the amount of HK $ 7,741,053.79 (U.S. $991,743.49, where U.S. $1 = HK $7.8055), plus interest at the Hong Kong judgment rate from October 30, 1991 until payment. This judgment represents the amount due under the remaining eighteen charter party Contracts plus taxed costs. (Copy of May 31, 1994 Judgment attached hereto as Exh. "38")

The total of the three above-noted judgments is U.S. $1,782,419.11.

53. SHANTRA SHANGHAI has refused to satisfy any of the above noted Judgments. (Copy of Oct. 31, 1994 letter from TASK to SHANTRA SHANGHAI attached hereto as Exh. "39".)

54. The judgments of the Hong Kong Court are valid, final, conclusive, and enforceable under Hong Kong law. As SHANTRA SHANGHAI failed to appeal such judgments within twenty-one days of entry of the default judgments, the judgments are also unappealable.

55. SHANTRA SHANGHAI has acted egregiously and in bad faith in all of its post-1985 dealings with TASK and has caused TASK to incur substantial costs in it efforts to bring about satisfaction of judgments.

56. SHANTRA SHANGHAI has taken affirmative steps to frustrate TASK's collection of the amounts as set forth in the Contracts, as awarded by the arbitrators and adjudicated by the Supreme Court of Hong Kong.

Defendant's Contacts with the United States

57. On October 30, 1991, Shantra New York was incorporated with an office and place of business at 2 World Trade Center, New York, New York.

58. The stated purposes for which Shantra, New York, was formed clearly set forth its role as agent, to wit:

> 1. To import, export, buy, sell and generally deal in and with . . . goods . . . of every kind and description;
>
> 2. To carry on the business of . . . agents, service agents, clearing agents . . .;
>
> 3. To export from and import into the United States of America . . . and any and all foreign countries, as principal or agent. . . .;
>
> 4. To carry on and conduct a general agency business, to act and to appoint others to act, as general agent, special agent, broker, factor, manufacturer's agent, purchasing agent, sales agent, distributing agent, representative. . . .

(Copy of Certificate of Incorporation of Shantra N.Y. attached hereto as Exh. "40")

59. Seventy percent of the capital stock of Shantra New York is owned by defendant SHANTRA SHANGHAI; the remaining 30% is owned by Shanghai International Holding Company, New York, New York. Shanghai International Holding Corporation (America), Inc. is 55% owned by Shanghai Overseas Enterprises Corporation, Shanghai, China, one of the resulting entities when SHANTRA SHANGHAI was

split in 1988. The remaining 45% is owned by ten, presently unidentified companies located in Shanghai, China.

60. Shantra New York, as reported by Dun & Bradstreet, was started in 1991. Intercompany connections between the foreign parent — defendant SHANTRA SHANGHAI — and its six subsidiaries, including Shantra New York, were reported by management to consist of trading connections. (Copy of report dtd. Mar. 6, 1995 attached hereto as Exh. "41")

61. The Chairman and President of Shantra New York is Mr. Ou Zhi-Heng who is or was the General Manger of SHANTRA SHANGHAI.

62. Shantra New York has acted, since its inception, *inter alia*, as an agent for its principal, SHANTRA SHANGHAI.

63. Defendant SHANTRA SHANGHAI engages in worldwide commercial activities and has established a Sino-US joint venture foreign trade company. It has been credited with importing more one third of Shanghai's total imports. Between 1991 and 1994, its import and export business ranked first in Shanghai and produced 1,100 million U.S. dollars in 1994 alone (documents downloaded using the Internet address established by SHANTRA SHANGHAI on the worldwide web section of the Internet attached hereto as Exh. "42")

64. As VSL/Harlifax (In liquidation) did not have the funds to satisfy any of the amounts due TASK under the above-mentioned judgments, and SHANTRA SHANGHAI refused to satisfy the judgments, on March 29, 1994 TASK took an assignment of VSL/Harlifax's rights against SHANTRA SHANGHAI for HK $13,910,992.36. This amount was premised on the June 1989 Final Arbitration Award and the three High Court judgments. (Copy of March 29, 1994 Deed of Assignment attached hereto as Exh. "43" (pp. 11-13)

65. No part of the amount due TASK was reduced by distribution of assets from the estate of VSL/Harlifax.

66. The arbitration award dated June 30, 1989 against VSL (Exh. "31" hereto) and the three Hong Kong judgments against SHANTRA SHANGHAI (Exhs. "36," "37" and "38" hereto) are closely related as they all arise out of and/or relate to the twenty one Contracts entered into by TASK and VSL in 1984 and 1985.

67. The judgments to date remain unsatisfied although payment thereof has been duly demanded.

68. Hong Kong, as a territory of Great Britain, the People's Republic of China, and the Federal Republic of Germany are all subject to the Convention on the Recognition and Enforcement of Foreign Arbitration Awards ("the Convention"), 9 U.S.C. §201 et seq.

69. As such, the PRC, SHANTRA SHANGHAI, and VSL/Harlifax had to have contemplated enforcement actions in other signatory states such as the United States.

70. The Judgment of the Supreme Court of Hong Kong, High Court was rendered in conformity with all international due process requirements, including proper subject matter and personal jurisdiction, thereby rendering said judgment valid, in conformance with public policy and, therefore, enforceable in the United States pursuant to federal and New York State common law, as well as the federal stationary provisions set forth in paragraph 4, *supra* herein and Article 53 of the N.Y. Civ. Prac. L & R.

71. By signing the Convention, SHANTRA SHANGHAI (as an instrumentality of the Peoples Republic of China) has implicitly waived any claim to sovereign immunity to an action to enforce a foreign money judgment pursuant to Article 53 of the N.Y. Civ. Prac. L.& R. 5301-09 and 28 U.S.C. §1605 (a)(1).

72. By contracting to make freight payments "payable to Northern Trust International, New York" to TASK through its agent, VSL, SHANTRA SHANGHAI performed acts within and without the United States in connection with a commercial activity which caused a direct effect in the United States. By these acts SHANTRA SHANGHAI forfeited the jurisdictional immunity normally afforded a foreign state pursuant to 28 U.S.C. §1605(a)2).

73. The Judgments against SHANTRA SHANGHAI are final, conclusive and enforceable in Hong Kong and thereby enforceable in this jurisdiction pursuant to federal and state statutory and common law and the doctrine of comity.

74. As a result of the foregoing, Plaintiff is entitled to a judgment converting the judgments of the Supreme Court of Hong Kong, High Court to a United States judgment in the amount of U.S. $1,782,419.11.

75. The Hong Kong post-judgment interest which has accrued through February 29, 1996 totals U.S. $870,618.26.

76. Plaintiff is additionally entitled to pre-judgment interest accrued through February 29, 1996 in the amount of U.S. $972,435.88.

77. Plaintiff is further entitled to exchange rate (or currency loss) damages. Plaintiff had to pay the time charter hire, port expenses, bunkers, etc. in U.S. dollars because Defendant failed to pay the five (5) percent freight balance pursuant to the Contracts and demurrage costs when they accrued.

78. Plaintiff was forced to pay these expenses at the time of their accrual by converting its credit which was in Deutsche Marks into U.S. Dollars. A substantial difference in exchange rates exists between the time when these payments were made and today.

79. VSL/Harlifax' failure to satisfy its obligations to TASK in 1985 thus caused TASK to also incur exchange rate (or currency fluctuation) damages totalling U.S. $1,443,110.27.

WHEREFORE, Plaintiff TRANSATLANTIC SHIFFAHRTSKONTOR GmbH demands judgment against the Defendant, granting Plaintiff:

1) U.S. $3,625,673.25 reflecting enforcement of Plaintiff's Hong Kong High Court judgment against Defendant, SHANGHAI FOREIGN TRADE CORPORATION, pursuant to 28 U.S.C. §1300 *et seq.*, §1605(a)(1)(2), 9 U.S.C. §201 *et seq.*, New York CPLR §5301 *et seq.*, as well as federal and New York common law, which sum includes pre-judgment and post-judgment interest calculated (through February 29, 1996) in the combined amount of $1,843,054.14;

2) currency exchange fluctuation losses in the amount of U.S. $1,443,110.27;

3) liquidator's and arbitration fees and costs;

4) costs incurred in attempts to collect on the various claims;

5) costs of this action including attorneys' fees; and

6) such other and further relief as this Court deems just, proper and equitable.

Dated: New York, New York
December 2, 1996

Yours, etc.,
KEANE & MARLOWE

By: /s/ Mary Ann C. Marlowe
Mary Ann C. Marlowe (MM 0723)

Attorneys for the Plaintiff
300 Park Avenue — 17th Floor
New York, New York 10022
(212) 572-6210

1200 Tices Lane — Suite 102
East Brunswick, NJ 08816
(908) 846-1000

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STANDARD FREIGHT PAYMENT

ORIGINAL

RIDER CLAUSES 18 TO 43 OF "VIVACITY"
CHARTER PARTY DATED 30 APRIL 1985 — P. 1

18. 95% of freight will be settled by documents against payment (D/P) basis whereby drafts to be drawn at eighteen banking days after sight upon the presentation of documents in following manner to a bank designated by the Charterers.

- photostat of original Bill(s) of Lading which should be duly certified by bank or notary public as true copy and that the signature on the Bill(s) of Lading is bona fide.
- freight invoice
- written confirmation of vessel's departure and original Bill(s) of Lading released to shippers.
- cargo quantity loaded on board in conforming with Bill(s) of Lading
- shippers' confirmation of receipt of original Bill(s) of Lading.
- Bill(s) of Exchange

Balance 5% shall be paid after right and true delivery of the cargo and after Owners have presented the Statement of Facts, both for the loading and discharging ports enabling Charterers to draw up proper time sheets. Any possible un-disputed despatch money shall be deducted on paying balance freight and any possible demurrage to be added to balance freight.

Full freight deemed earned on completion of loading and shall be due discountless and non-returnable whether ship and/ or cargo lost or not lost.

Freight payable to Northern Trust International, New York, Account No. 102194/20230 in favour of Deutsch-Skandinavische Bank AG, Hamburg/Transatlantic Schiffahrtskontor GMBH, Hamburg, under telex advice to Deutsch-Skandinavische Bank AG, Hamburg, telex No. 2164882.

In addition, the Owners will, immediately after the issue of Bill(s) of Lading to the Shippers, arrange facsimile of these Bill(s) of Lading copy to Facsimile No. Group 3 852-123-4382 Attn: Vincor Shipping Co., Ltd. C/O Mr. Peter Jolly of Deacons.

TYPICAL BANK ADVICE

64882 dskh d
01.11.85 07.42 urh ++

2164882 dskh d
72572 sbci hx

[stamp illegible]

nov 1, 1985 time: 14:44

from swiss bank corp., hk branch

to deutsch-skandinavische bank ag,
hamburg

for your information only
---

please be advised that we remitted usd380,945.25 value today to your a/c with northern trust int'l, new york a/c no. 102194/ 20230 for a/c transatlantic schiffahrtskontor gmbh, humburg (via swiss bank corp., new york) by order of vincor shipping co., ltd., hk ref., settlement of your invoice dated 9th oct 1985 re.m.v. "world ajax" – charter party dated 28th mar. 1985 stop

and we asked northern trust int'l, new york to telex advise you upon receipt of funds, please avoid all possible duplication stop

our ref.payments kt/sw/lml

thanks and regards

avisiort: Fr. [illegible]
am: 1/11-85 um : [??] Uhr

72572 sbci hx
2164882 dskh d

01.11.85 07.48 urh ++

EXCERPTS OF TRANSCRIPT OF MR. KU KAM SEPTEMBER 4, 1991

[4]

4/9/91 Morning * * *

be released tomorrow afternoon?

COURT: Yes, you may be released now and you must be back here at 10 am tomorrow morning.

CHAN: Today?

COURT: No, I am going to hear Mr. Ku Kan first, and then Mr. Y.T. Cheng.

CHAN: Can I return about 3 or 4 p.m.?

COURT: You can come back at 10 o'clock tomorrow morning. You won't be required before that. All right, 10 o'clock tomorrow morning, Mr. Chan. And Mr. Cheng 2:30 please. Mr. Y. T. Cheng, you may be released until 2:30 this afternoon.

CHENG: 2:30

Examination of Mr. Ku Kam

COURT: Right.

(Affirmation of Mr. Ku Kam in Shanghainese)

INTERPRETER: Sworn in Shanghainese.

COURT: It's Ku Kam, is it?

KU: Yes.

BLEACH: Mr. Ku, for the purpose of the record, could you tell the Court your full residential address please?

KU: 15A, 17th floor, Mei Foo Sun Chüen.

BLEACH: Do you have a home in the People's Republic of China?

KU: Yes.
BLEACH: Are you a citizen of PRC?
KU: Yes.
BLEACH: So you know what's happening today, I would tell you I represent the liquidators of Harlifax Ltd. which was formerly known as Vincor Shipping Co. Ltd.?
KU: Yes.
BLEACH: That company was wound-up by Order of the HK Courts on 13/9/89.
KU: Yes.
BLEACH: The purpose of asking you to come to Court today is to see whether you can assist in providing information that would help the liquidator to understand the affairs of Harlifax.

[7]

4/9/91 Morning * * *

Shanghai Foreign Trade Corporation.
BLEACH: S H A N T R A.
KU: Yes.
BLEACH: Could you tell us please what your position in SHANTRA was in August '85?
KU: Deputy General Manager.
BLEACH: Did you have full executive powers in that position?
KU: I was responsible for imports.
BLEACH: Yes, did those imports almost invariably come by sea?
KU: Yes.

BLEACH: In ships that Vincor Shipping chartered on your behalf?

KU: The one who was responsible to charter the ships was Li Xue Bi.

BLEACH: Mr. Ku, I apologise, I didn't mean to suggest that you yourself were personally involved in the mechanics of the charter, but I was asking you to confirm that SHANTRA brought the goods in on ships that Vincor had chartered on behalf of SHANTRA?

KU: Yes.

BLEACH: Thank you. I think Mr. Li Xue Bi wa an official of SHANTRA but junior to you?

KU: Right.

BLEACH: And he had a hands-on involvement with the various charter parties that were effected on behalf of SHANTRA by Vincor?

KU: Yes.

BLEACH: Could you tell me please who Mr. Mei He Jun is?

KU: Bureau of Metallurgy.

BLEACH: It is Shanghai Metallurgical?

KU: Yes, Shanghai.

BLEACH: Was he appointed to act to represent the interest of that concern?

KU: Yes, but concerning metallurgy.

BLEACH: And Mr. Xu Duan-Yong, was he also

[9]

4/9/91 Morning * * *

BLEACH: One of those joint venture companies was to be Vincor Shipping Co. Ltd.?

KU: Yes.

BLEACH: And SHANTRA was to have representation on the Board of that company?

KU: Yes.

BLEACH: And SHANTRA was to have a shareholding in that company?

KU: Yes.

BLEACH: Was the purpose insofar as Vincor Shipping was concerned, that it would act as the agent of SHANTRA for the shipment of freight?

KU: Yes.

BLEACH: Could I ask you please to go to what I think is probably the last of one page on the Chinese where it says "Section 10: Risks". Now you've read that? Again could I summarise it by asking you to confirm the following: what the joint venture partners were agreeing was if possible all the risk involved were to be the subject of insurance?

KU: May I take a look?

BLEACH: Yes, of course.

KU: Right.

BLEACH: But you will see from the final part of that paragraph that in the event insurance could not be obtained for certain risks, then those risks and the

liability for those risk would be borne by the joint venture partners?

KU: Yes, that's what's written.

BLEACH: And that's what was intended.

KU: Right.

BLEACH: Was the purpose for that as follows: that because it was a joint venture company, Vincor was not expected to keep any profit for itself, that would go to the joint venture partners, nor would it be expected to incur any loss — that would also be borne by the joint venture partners?

KU: Just reading Clause 10 — the joint venture company shall not bear any risks, all risks shall be with insurance companies.

[12]

4/9/91 Morning * * *

behalf of SHANTRA Vincor chartered numerous ships from Transatlantic?

KU: I did not handle the affairs personally but you can find out from the document.

BLEACH: Well, we have found out from the documents, Mr. Ku, but in your position, are you seriously telling this Court you are not in position to confirm that after signing of the Agreement, SHANTRA got Vincor to charter ships from Transatlantic?

KU: I can't remember so clearly even though I am the Deputy General Secretary of this SHANTRA company I cannot deal with all these matters they are all

in the documents.
BLEACH: I am not suggesting you did deal with all these matters but I am suggesting you know full well that Vincor chartered ships from Transatlantic at the request of and on behalf of SHANTRA.
KU: Yes.
BLEACH: You confirmed that do you not?
KU: I do not know the full details but I know of this fact.
BLEACH: I am not suggesting you know about individual ships or the particular cargoes but you are fully aware of the underlying relationship?
KU: Yes.
BLEACH: Having established that I would however like to look in some detail as to what exactly you did know? Is it not correct that you are in fact provided with accommodation in HK at Excelsior Court in Waterloo Road?
KU: I arrived in HK in Oct. '89. I have left this SHANTRA company for 3 years.
BLEACH: I think the position is this — you arrived in HK '89, essentially you took up residence here.
KU: Then I became a HK citizen.
BLEACH: Going back to '84 '85, it is not correct that you were coming in your capacity as representative of SHANTRA to HK on a regular basis and you were provided accommodation at 12B Excelsior Court, 83 Waterloo Road?

BLEACH: How can it be a matter — Mr. Ku, I think you should stop keeping notes, we don't have very long, I'm afraid — how can it be a matter for the Port Authorities?

KU: We only dealt with the trade and any if there is any violation concerning port matters it's to be dealt with according to the Port Authority.

BLEACH: Mr. Ku, you were a senior executive of a government body who dealt with freight and shipping in Shanghai. Correct?

KU: I only dealt with the trading aspect.

BLEACH: And trade consists amongst other things of bringing in freight on ships, correct?

KU: And transport, yes.

BLEACH: And if you don't have your own ships, you have to charter them from a shipowner?

KU: Yes.

BLEACH: And what SHANTRA would do was to ask Vincor to charter ships on its behalf from Transatlantic?

KU: Yes.

BLEACH: Now you know surely that if there is a delay in simplistic terms in the ship getting back to the owner the person who was chartering the ship has to pay damages, which is called demurrage?

KU: Demurrage was determined by the Port Authority and it was not the trade department that made

the decision.
BLEACH: Mr. Ku, let me ask you this. If you ask Vincor to charter a ship for you and Vincor did, and the ship was 5 years late, are you suggesting that SHANTRA wouldn't be responsible for the damage suffered by the shipowner?
KU: I don't understand why the ship would be returned 5 years late.
BLEACH: Or indeed any period late.
KU: I cannot give you the answer in general you have to give me a specific question.
BLEACH: All right. In respect of a number of the ships that Vincor chartered from Transatlantic on behalf of

[24]

4/9/91 Morning * * *

KU: It's Wang Sheng Yuan who went to HK.
BLEACH: Yes, he is sent down by SHANTRA to be their representative in respect to Vincor Shipping.
KU: Yes.
BLEACH: Could you therefore confirm that he has a hands-on involvement with the arrangements as to the charter parties?
KU: Yes.
BLEACH: Could you look at para. 3 please to see what's on it? The hands-on representative from SHANTRA says to TASK: "Vincor shipping is representing major interest of SHANTRA. If loss

incurred to Vincor means loss will be finally borne by SHANTRA."

KU: Yes.

BLEACH: Now having seen that from a representative of SHANTRA, before we go to any other documents, would you please confirm in respect of charter parties for the benefit of SHANTRA, the damages became payable to the shipowner, it was understood they would be paid eventually by SHANTRA?

KU: That was stated by Wang Sheng Yuan, yes.

BLEACH: I know, but I want your confirmation that it accurately represents what is said there — sorry, accurately represents what the position was.

KU: When Wang Sheng Yuan came to HK he was acting according to instructions from Vincor Shipping.

BLEACH: All right — turn on to page 9 please. I beg your pardon, I'm sorry.

KU: Wang Sheng Yuan only acted according to the instructions from Vincor Shipping and he could not obtain instructions from SHANTRA. He would not have obtained approval from SHANTRA before making this statement.

BLEACH: Why would he need approval from anybody?

KU: It's because he could only receive orders from Vincor Shipping.

BLEACH: No. You've already told us that this

gentleman was sent down to represent the interest of SHANTRA — that's what you told us on oath.

4/9/91 Morning [26]

KU: The goods were ordered by SHANTRA.

BLEACH: Mr. Ku, bearing in mind the position that you held with SHANTRA and your directorship now, can I take you to be a man who has some experience in commercial matters?

KU: Yes.

BLEACH: I would ask the question again and I would be grateful for a straightforward answer, it is not correct that Vincor chartered ships from Transatlantic acting as agent for and behalf of SHANTRA?

KU: Right.

BLEACH: Would that be a convenient time, Master?

COURT: Yes. Right. 2:30.

(ADJOURNED)

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

BETWEEN

HARLIFAX LIMITED (In Liquidation) Plaintiff

and

SHANGHAI FOREIGN TRADE CORPORATION Defendant

SEALED COPY
THE SEAL OF THE
SUPREME COURT
OF HONG KONG
[seal]

-4 AUG 1993

JUDGMENT

The 4th day of August 1993

Pursuant to the Order of Master Bokhary dated the 30th day of July 1993 whereby it was ordered that judgment as hereinafter provided be entered for the Plaintiff against the Defendant

IT IS THIS DAY DECLARED and ADJUDGED:—

1 That the Defendant is liable to indemnify the Plaintiff in respect of:—

(a) all the Plaintiff's liabilities to Transatlantic Schiffahrtskontor GmbH arising out of the charter parties that are the subject matter of the proof of debt of Transatlantic Schiffahrtskontor GmbH and in respect of which Transatlantic Schiffahrtskontor GmbH are admitted to proof by the joint liquidators of the Plaintiff.

(b) all costs and expenses incurred by the Plaintiff in respect of and arising out of the said charter parties and the said liabilities thereunder.

2. That the Defendant do forthwith pay and fully indemnify the Plaintiff in the amount of HK$4,771,886.57 being the amount that, as at the date hereof, the joint liquidators have adjudicated as being due and owing from the Plaintiff to Transatlantic Schiffahrtskontor GmbH.

3. That the Defendant do pay and fully indemnify the Plaintiff in respect of all such liabilities, costs and expenses as the joint liquidators may hereafter adjudicate as being due and owing from the Plaintiff to Transatlantic Schiffahrtskontor GmbH.

4. There be liberty to the Plaintiff to apply for orders that judgment be entered against the Defendant to pay such further sums pursuant to paragraph 3 above.

5. That the Defendant do pay to the Plaintiff interest on the sum of HK$4,771,886.57 at the judgment rate from the 30th day of October 1991 until payment.

6. That the costs herein, including the costs of and occasioned by this application be taxed and paid by the Defendant to the Plaintiff.

J. Betts
Registrar

1991 No. A8253

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

BETWEEN

HARLIFAX LIMITED (In Liquidation) Plaintiff

and

SHANGHAI FOREIGN TRADE CORPORATION Defendant

JUDGMENT

Dated the 4th day of Aug. 1993
Filed the 4th day of August 1993

Baker & McKenzie
14/F., Hutchison House
10 Harcourt Road
Hong Kong
Ref: PJC/AN01325.DOC/4-6

High Court Action No. A1205 of 1992

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

BETWEEN

HARLIFAX LIMITED (In Liquidation)
(formerly known as VINCOR SHIPPING COMPANY LIMITED)

AND

NATHANAEL CHAN NAI KANG	1st Defendant
VINCOR FOREST PRODUCTS LIMITED	2nd Defendant
VINCOR SECRETARIAL & MANAGEMENT SERVICES LIMITED	3rd Defendant
VINCOR HOLDINGS LIMITED	4th Defendant
MACVIN ENGINEERS LIMITED	5th Defendant
SHANGHAI FOREIGN TRADE CORPORATION	6th Defendant

SEALED COPY
THE SEAL OF THE SUPREME COURT OF HONG KONG
[seal]

24 SEP 1993

JUDGMENT

Dated the 24th day of September 1993

No Defence having been served by the 6th Defendant herein, IT IS THIS DAY ADJUDGED that the 6th Defendant do pay the Plaintiff the sum of HK$1,398,052.00 together

with interest thereon at the rate of 9.5% per annum from 19th February 1992 until the date hereof and $1,680.00 fixed costs.

J. Betts
Registrar

High Court Action No. A1205 of 1992

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

BETWEEN

HARLIFAX LIMITED (In Liquidation) (formerly known as VINCOR SHIPPING COMPANY LIMITED)	Plaintiff
AND	
NATHANAEL CHAN NAI KANG	1st Defendant
VINCOR FOREST PRODUCTS LIMITED	2nd Defendant
VINCOR SECRETARIAL & MANAGEMENT SERVICES LIMITED	3rd Defendant
VINCOR HOLDINGS LIMITED	4th Defendant
MACVIN ENGINEERS LIMITED	5th Defendant
SHANGHAI FOREIGN TRADE CORPORATION	6th Defendant

JUDGMENT

Dated the 24th day of September 1993
Filed the 24th day of September 1993

We, solicitors for the Plaintiff certify that the time for service by the 6th Defendant prescribed by the Rules of Court has expired and that the 6th Defendant is in default in serving its Defence within such time.

Dated the 22nd day of September 1993

/s/ Baker McKenzie
Messrs. Baker & McKenzie
Solicitors for the Plaintiff

Baker & McKenzie
14th Floor, Hutchison House
10 Harcourt Road
Hong Kong
Ref: PJC/VAC/32-041478-2
[illegible]

1991 No. A8253

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

BETWEEN

HARLIFAX LIMITED (In Liquidation)
(formerly known as Vincor Shipping Co. Ltd.) Plaintiff

and

SHANGHAI FOREIGN TRADE
CORPORATION Defendant

JUDGMENT

The 31st day of May 1994

SEALED COPY
THE SEAL OF THE
SUPREME COURT
OF HONG KONG
[seal]

1 JUN 1994

Pursuant to paragraph 4 of the Order of Master Bokhary dated the 30th day of July 1993, whereby it was ordered that the Plaintiff be at liberty to apply for orders that judgment be entered against the Defendant in respect of further sums due and owing pursuant to paragraph 3 of the said Order,

IT IS THIS DAY DECLARED AND ADJUDGED:

1. That the Defendant do forthwith pay and fully indemnify the Plaintiff in the amount of HK$7,741,-053.79 being an additional sum adjudicated by the joint liquidators of the Plaintiff as being due and

owing from the Plaintiff to Transatlantic Schiffahrtskontor GmbH.

2. That the sum of HK$7,741,053.79 is a sum additional to the amount of HK$4,771,886.57 in respect of which Judgment was entered on 4th August 1993.

3. That the Defendant do pay to the Plaintiff interest on the sum of HK$7,741,053.79 at the judgment rate from the 30th day of October 1991 until payment.

4. That the costs herein, including the costs of and occasioned by this application be taxed and paid by the Defendant to the Plaintiff.

J. Betts
Registrar

1991 No. A8253

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

BETWEEN

HARLIFAX LIMITED (In Liquidation)
(formerly known as Vincor Shipping Co. Ltd.) Plaintiff

and

SHANGHAI FOREIGN TRADE
CORPORATION Defendant

JUDGMENT

Filed the 1st day of June 1994

Baker & McKenzie
14th Floor, Hutchison House
10 Harcourt Road
Hong Kong
Ref: PJC/VAC/32-041478-2
[illegible]

(2)

No. 00- 929

Supreme Court, U.S.
FILED
FEB 2 2001
CLERK

IN THE

Supreme Court of the United States

TRANSATLANTIC SCHIFFARTSKONTOR GmbH,

Petitioner,

v.

SHANGHAI FOREIGN TRADE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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16pp

QUESTION PRESENTED

The Foreign Sovereign Immunities Act, in pertinent part, permits courts of the United States to exercise jurisdiction over claims against an instrumentality of a foreign state, if "the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

Does this provision permit a United States District Court to exercise jurisdiction over a suit by a German corporation against an instrumentality of the People's Republic of China, where the German plaintiff was suing as the assignee of three default judgments entered by a court in Hong Kong against the Chinese agency; the United States suit sought to convert those Hong Kong judgments into United States judgments; and the Hong Kong judgments had been entered in favor of the bankruptcy trustees of a Hong Kong corporation, based on claims that the Chinese agency had received fraudulent transfers, in China, from that Hong Kong corporation, and had breached a duty to indemnify that Hong Kong corporation for losses it had suffered in Hong Kong?

STATEMENT PURSUANT TO RULE 29.6

Respondent Shanghai Foreign Trade Corporation ("SFTC") has no parent corporations. No publicly held company owns 10% or more of SFTC's stock.

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Rule:

United States Supreme Court Rule 10(c) 5

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner Transatlantic Schiffartskontar GmbH ("TASK") brought this case to convert three Hong Kong judgments into United States judgments.

TASK, a German corporation, sued as the assignee of the bankruptcy liquidators of a Hong Kong corporation known as Vincor Shipping Co., Ltd. ("VSL"). The liquidators had assigned to TASK three judgments which VSL's bankruptcy estate had obtained, on default, in the Supreme Court of Hong Kong against respondent Shanghai Foreign Trade corporation ("SFTC"), a corporation owned by the government of the People's Republic of China.

The United States Court of Appeals for the Second Circuit held that SFTC was immune from the jurisdiction of the United States Courts under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604 (reproduced at A54). (References preceded by "A" are to the Appendix to the Petition for Certiorari; references preceded by "CAJA" are to the Joint Appendix filed in the Court of Appeals.)

B. Statement of Facts

Introduction. SFTC's motion to dismiss was based solely on the face of TASK's Amended Complaint. (*See* A2). Accordingly, for purposes of this Brief, SFTC will assume the truth of the allegations made in that complaint. *See, e.g., Davis v. Monroe County Board of Education,* 526 U.S. 629, 633 (1999).

Vincor Shipping Co., Ltd. Vincor Shipping Co., Ltd. ("VSL") was a Hong Kong corporation, formed under the Companies Ordinance Act of Hong Kong. (A72). TASK alleges that VSL was a joint venture among several public and private entities in China and Hong Kong, including the predecessor to SFTC. (A67, 72).

The Shipping Contracts. VSL's business included chartering vessels and engaging in maritime transport. (A68). Beginning in 1984, VSL entered into certain charter parties and contracts of affreightment with TASK, a German shipping company, regarding shipments of cargo from Europe to China. (A68).

SFTC was not a party to, or a signatory of, any of these shipping contracts (CAJA 54-75), but TASK's Complaint alleges that VSL was the "agent" of SFTC and that SFTC had a duty to indemnify VSL for any losses VSL incurred under these contracts. (A69). The Complaint alleges, inconsistently, that this duty to indemnify was "implied by law" under the joint venture agreement (A69) and that there was "an internal agreement" between SFTC and VSL providing for indemnification (A71; *see* A3).

The shipping contracts between VSL and TASK were governed by Hong Kong law and provided that any disputes were subject to arbitration in Hong Kong. (A70). They also provided that freight charges were to be paid by VSL to Transatlantic in U.S. dollars, and that payment was to be made to Transatlantic's bank account in Hamburg, Germany via wire transfer through a correspondent bank in New York. (A70, CAJA 81-90).

TASK's Arbitration Against VSL. In 1984 and 1985, the port of Shanghai, China was congested, resulting in delays in unloading ships chartered by VSL from TASK. As a result, TASK claimed demurrage fees from VSL, which VSL did not pay. (A71). ("Demurrage" refers to the fee payble to the owner of a chartered vessel if the vessel is not unloaded and returned within the time specified in the charter party.) (A3 n.2).

TASK brought arbitration claims against VSL in Hong Kong under the shipping contracts. SFTC was not named as a party to any of these arbitrations, and did not appear in any of them. (A71, CAJA 144-199). In December of 1987, an award was entered in favor of TASK with respect to some of those contracts; a judgment entered on that award was satisfied. (A72). In June of 1989, another arbitral award was entered in favor of TASK with respect to some, but not all, of the remaining contracts. (A73). Both awards were rendered solely against VSL; neither mentioned SFTC. (CAJA 144-199).

VSL's Bankruptcy. While these arbitrations were pending, VSL allegedly made three transfers of capital to SFTC, between October of 1986 and November of 1988. (A73). In December of 1988, VSL, after changing its name to "Harlifax Ltd.," declared voluntary liquidation in Hong Kong. (A72).

TASK, as a credit of VSL, applied to the Supreme Court of Hong Kong to appoint bankruptcy liquidators for VSL. TASK made claims against VSL's bankruptcy estate with respect to certain of the shipping contracts which had not been the subject of arbitral awards. The liquidators allowed those claims in part. (A74, CAJA 200-201).

The Hong Kong Judgments. Those bankruptcy liquidators later brought three lawsuits in the courts of Hong Kong against SFTC, on behalf of VSL. (A74). SFTC did not appear in those actions, and default judgments were entered. (A75).

Three default judgments were entered, all in the name of VSL. (A99-108). One judgment was to recover the monies which VSL had transferred to SFTC before its bankruptcy. The other two judgments were based on SFTC's breaches of its alleged obligation to indemnify VSL — one with respect to the arbitral award against VSL in favor of TASK, and the other with respect to TASK's claims under the contracts which had not resulted in arbitral awards. (A75-76).

The liquidators of VSL subsequently assigned these judgments to TASK, in satisfaction of TASK's claims again VSL's bankruptcy estate. (A78).

C. Proceedings Below

TASK filed suit against SFTC in the United States District Court for the Southern District of New York. That court initially dismissed the case, finding that SFTC had immunity from suit under the FSIA. (A18-36). The district court later granted a motion for reconsideration, and denied SFTC's motion to dismiss. (A37-45).

On interlocutory appeal, the Court of Appeals for the Second Circuit reversed, and ordered the complaint dismissed. (A1-15). That court later denied TASK's petition for rehearing. (A16-17). TASK then filed its Petition for Certiorari.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS INVOLVES NO IMPORTANT QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT

The Court of Appeals resolved this case on extremely narrow grounds, limited to the unusual facts of this case. Accordingly, this case involves no important question of federal law which should be settled by this Court. *See* Supreme Court Rule 10(c).

Although TASK's Petition refers to various important issues under the FSIA which were raised below, the Second Circuit declined to decide any of those issues, finding that, under the unique facts of this case, SFTC would not be subject to jurisdiction in the United States regardless of how those issues were resolved.

Thus, for example, although one of the alternative arguments SFTC raised in the Court of Appeals was that no suit to enforce a foreign judgment could be brought under section 1605 of the FSIA (*see* A7-8 & n.3), the Court of Appeals decided the case without reaching that issue (A8-9). Similarly, the Court of Appeals did not reach the issue of whether the assignee of a foreign judgment could invoke the jurisdiction of the federal courts under the FSIA. (A11).

It is well-settled that this Court will "generally . . . not address arguments which were not the basis for the decision below." *E.g.*, *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 300 n.7 (1996); *Matsushita Electric Industrial Co. v. Epstein*,

516 U.S. 367, 379 n.5 (1996). Because none of the issues raised in the Petition was actually the basis for the decision of the Court of Appeals, the Petition should be denied.

TASK invoked the district court's jurisdiction under 28 U.S.C. § 1605(a)(2). (*See* A5; the statute is reproduced at A55). Under that statute, foreign states and their instrumentalities — which are normally immune from the jurisdiction of state and federal courts, 28 U.S.C. § 1604 (A54) — may be sued in the United States if the suit is "based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

Thus, to support jurisdiction in this case, TASK was required to allege facts sufficient to show that "this lawsuit is (1) based upon an act outside the territory of the United States; (2) that was taken in connection with a commercial activity of [SFTC] outside this country; and (3) that caused a direct effect in the United States." *Republic of Argentina v. Weltover*, 504 U.S. 607, 611 (1992). The Court of Appeals found, correctly, that TASK's allegations failed to satisfy the "based upon" requirement, and it therefore did not need to reach any of the other elements. (A7-11).

As this Court has previously held, a suit is "based upon" only "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). In other words, an "action is based upon the elements that prove the claim, no more and no less." *Id.* (*quoting Santos v. Compagnie Air France*, 934 F.2d 890, 893 (7th Cir. 1991)). It is not sufficient under the FSIA that a case have "a mere connection with, or

relation to, commercial activity," *Nelson*, 507 U.S. at 358, unless that commercial activity is an element of the claim sued upon.

TASK argued below, and argues in this Court, that its shipping contracts with VSL caused a direct effect in the United States, because VSL's payments to TASK were to be forwarded through a correspondent bank in New York. That may or may not be true, but is quite beside the point. TASK did not sue in this case to recover damages for VSL's breach of its contracts with TASK, nor did it sue to enforce the arbitration awards it obtained against VSL. It sued SFTC, to enforce judgments rendered in favor of VSL against SFTC, which judgments were later assigned to TASK. Those judgments awarded damages to VSL on account of SFTC's receipt of fraudulent conveyances from VSL — an act which took place in China — and on account of SFTC's failure to indemnify VSL — an omission which took place in China and Hong Kong. Those judgments were thus based upon no act which caused any effect, much less a direct one, in the United States.

Moreover, as the Second Circuit held, the fact that the liquidators of VSL assigned those judgments to TASK, rather than some other assets of VSL, was wholly fortuitous, a fact which further erodes any connection between TASK's claim and any act of VSL which caused any effect in the United States. The Second Circuit explained its holding as follows:

> The legal proceedings against SFTC that resulted in the three default judgments that TASK now seeks to enforce were brought by VSL's Hong Kong liquidators against SFTC on behalf of VSL. TASK now has a claim against SFTC only because

> the VSL liquidators chose to assign to TASK these judgments rather than one other assets that would have satisfied TASK's claims in the amount of HK$12,512,940.36 against VSL. But how VSL's liquidators chose to pay TASK was not in any way dependent on the New York contract or on any acts in breach of that contract that had a direct effect in New York. And TASK was, presumably, indifferent to show this payment was to be accomplished.
>
> Thus, VSL's obligations to TASK might have been satisfied with cash, with a pot of gold, or with HK$12,512,940.36 worth of bananas. Similarly, VSL might have assigned to TASK foreign court judgments that VSL obtained against SFTC for SFTC's breach of a contract whose entire locus and place of performance had nothing to do with the United States or with TASK. Had VSL done this, it clearly could not be argued that these judgments were "based upon" acts having a direct effect in the United States. For even assuming that foreign judgments, or the assignment of them, can ever satisfy the "based upon" requirement, if the acts upon which the assigned judgments are themselves grounded do not meet the "based upon" requirement of § 1605(a)(2) of the FSIA — i.e., where they are not acts taken in connection with a commercial activity that caused a direct effect in the United States — an action to enforce the foreign judgments in U.S. Courts must fail for lack of subject matter jurisdiction.

(A 10-11) (footnotes omitted).

In short, the decision of the Second Circuit was clearly correct under the prior decisions of this Court and is, in any event, an extremely narrow holding based on the unusual facts of this particular case. There is thus no basis for granting a writ of certiorari.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH NO OTHER CIRCUIT'S DECISIONS

TASK claims that the decision below conflicts with decisions of the Fifth and Tenth Circuits, because the Second Circuit supposedly held that assignees have no right to sue under the FSIA. The Second Circuit, however, held no such thing. Indeed, it expressly declined to decide whether or not suits on assigned or purchased judgments could satisfy the FSIA. (A11). Instead, as noted above, the Second Circuit recognized that TASK was suing as the assignee of VSL's bankruptcy liquidators, and therefore held that it could not rely on its *own* contractual dealings with VSL as a basis for asserting jurisdiction over SFTC. (A10-11).

The cases cited by TASK (Petition at 24-26) are not to the contrary. In *Byrd v. Corporacion Forestal y Industrial*, 182 F.3d 380, 391 (5th Cir. 1999), the court held that assignees of a lease could sue under the FSIA if their assignor could have sued under that statute, because they acquired the rights of their assignor. In this case, in contrast, TASK's assignors (the bankruptcy liquidators of VSL) could not have sued under the FSIA, because their claim was based solely on acts and omissions which took place in China and Hong Kong, not on any acts which caused any direct effect in the United States. Indeed, this was the explicit basis of the Second Circuit's decision. (A10-11)

The other case relied upon by TASK, *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1218 (10th Cir. 1999), merely held that privity of contract between the plaintiff and the foreign sovereign is not necessary under the FSIA, so long as the foreign sovereign injured the plaintiff through commercial activity having a direct effect in the United States. Here, TASK's suit was dismissed not for lack of privity of contract, but simply because the only rights it could assert — those of its assignors — did not arise out of any act which caused any direct effect in the United States. (A11).

* * *

In short, the Second Circuit's decision was entirely consistent with this Court's prior decisions under the FSIA, and with the decisions of other circuits. This case, moreover, involves no important issues of federal law which should be decided by this Court, bur rather represents nothing more than an application of well-settled rules to a unique and uncommon factual situation.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 00-929

In the

Supreme Court of the United States

TRANSATLANTIC SCHIFFAHRTSKONTOR GMBH,

Petitioner,

– against –

SHANGHAI FOREIGN TRADE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY BRIEF OF TRANSATLANTIC SCHIFFARTSKONTOR GMBH IN SUPPORT OF CERTIORARI

By misinterpreting Supreme Court precedent regarding the basic elements of the single most important exception to foreign state immunity under the FSIA, by creating an inter-circuit split of authority regarding an assignee's rights under the FSIA, and by not following its own prior precedent regarding the analysis of foreign judgments under the FSIA, the Second Circuit has created a critical, all encompassing need for this Court's guidance. The silence of respondent with respect to the key aspects of this petition only confirms the position of petitioner and makes the need for this Court's intervention and guidance even more apparent.

REPLY TO SFTC'S QUESTION PRESENTED

In phrasing its counter question presented, respondent omits any reference to the Second Circuit's undisputed error in imputing a "requisite U.S. Act" to the "direct effect" or third clause of the commercial activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C.§1605(a)(2). It is this erroneous construction which creates a conflict between the decision herein and that of this Court in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), as well as all other circuit court of appeals' decisions interpreting this provision. *Cf.* petitioner's question no. 1.

To imply the absence of any connection with the United States, and thus no subject matter jurisdiction under §1605 (a)(2), SFTC also omits any reference to the requisite "direct effect" which occurred in New York as a result of its acts outside the territory of the U.S. This requisite direct effect, i.e. the failure of the contractual payments to be made to the designated New York bank, was acknowledged by both the district court, when it denied SFTC's motion to dismiss (A 40-42), and the Second Circuit when it reversed that decision. (A 6-7) *Cf.* petitioner's question no. 3(3).

Similarly, SFTC avoids any mention in its counter question presented of the undisputed, requisite "commercial activity of

the foreign state elsewhere," i.e., the twenty-one shipping contracts entered into by petitioner and VSL on behalf of SFTC. Even if one employs respondent's analysis of SFTC's breach of an alleged indemnification agreement between SFTC and its agent VSL, for the monies due under these contracts, there is still an "act [by SFTC] outside the territory of the United States [the breach of the indemnification agreement] in connection with a commercial activity of the foreign state elsewhere [the contracts] and that act causes a direct effect in the United States [failure of payments to reach the New York bank designated in the contracts.]" 28 U.S.C. §1605(a)(2) *Cf.* petitioner's question no. 3(2).

Finally, while respondent emphasizes that TASK is suing as an assignee of three default judgments obtained against SFTC in favor of VSL/Harlifax (in liquidation), respondent the fact that TASK was the real party in interest to the claims giving rise to those judgments and is thus also the beneficial owner of those claims and the related judgments it now seeks to enforce. *Cf.* petitioner's question no. 3(1).

REPLY TO SFTC'S STATEMENT OF THE CASE

Respondent states that "SFTC was not a party to, or a signatory of, any of these shipping contracts" citing the signature of VSL on the contracts. (Resp. Br. at 2) This is misleading as both the district court and the Second Circuit accepted petitioner's argument that SFTC was the disclosed principal of VSL under these contracts. (A 7, 43)

Moreover, there is nothing "inconsistent" about SFTC's duty to indemnify VSL as alleged in the Complaint. (Resp. Br. at 2) This duty was *both* implied by law as a result of the principal-agent relationship (A 69) and was an express term of the joint venture agreement between SFTC and two other entities pursuant to which VSL was formed. (A 68, ¶¶ 11, 12; A 92:1-93:40)

Despite the express language of the contracts, various bank advices, the acceptance by the Second Circuit and the district court that the payments were to be made to a contractually designated New York bank (A 87, 88, 6-7, 42), and that a

"direct effect" therefore occurred in the U.S., SFTC persists in stating that the "payment[s] w[ere] to be made to Transatlantic's bank account in Hamburg, Germany via wire transfer through a correspondent bank in New York." Nothing in the record indicates that the payments were to be transferred to Germany — only that the New York bank was to telex advise the German bank upon receipt of the funds. (A 87, 88) However, even assuming *arguendo* that the payments were to be transferred to Germany, a subsequent transfer would not negate the direct effect in New York, which occurred as the "immediate consequence" of SFTC's breach. (A 41-42, citing *Hanil Bank v. PT. Bank Negara Indonesia*, 148 F.3d 127, 133 (2d Cir. 1998); *see also, Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 729 (9th Cir. 1997)).

REPLY TO SFTC'S ARGUMENT

I. SFTC DOES NOT ADDRESS THE DIRECT CONFLICT BETWEEN THE SECOND CIRCUIT'S ERRONEOUS REQUIREMENT OF "A U.S. ACT" AND THIS COURT'S "BASED UPON" ANALYSIS IN *REPUBLIC OF ARGENTINA V. WELTOVER*

Now, before *this* Court, respondent correctly cites *Republic of Argentina v. Weltover*, 504 U.S. 607, 611 (1992) and the requisite elements of §1605(a)(2). (Resp. Br. at 6). In the courts below, however, SFTC argued, and the Second Circuit adopted its contention, that the "based upon" analysis in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), governed the instant dispute. (A 7, 9) Significantly, the district court had correctly recognized in both of its decisions that *Weltover* is the governing precedent herein (A 28, 40), and in its decision on reconsideration, that *Nelson*, unlike the instant case, required commercial activity *in* the U.S. since it "involved the *first* clause of section 1605(a)(2). . . ." (A 42) (emphasis added)

Notwithstanding its currently appropriate citation of *Weltover*, respondent makes no effort in its opposition brief to reconcile *Weltover's* requirement of "an act *outside* the territory of the United States" with the Second Circuit's erroneous reliance herein upon the absence of "the requisite *U.S.* Act of

the assignor" (A 11) or, as stated in its holding shortly thereafter, "VSL's assumedly *U.S.* Acts." *(Id.)*. Respondent's deafening silence regarding this dispositive error clearly reflects SFTC's recognition of the correctness of petitioner's position.

II. THE SECOND CIRCUIT'S RELIANCE UPON TASK'S STATUS AS AN ASSIGNEE CLEARLY CONFLICTS WITH THE LAW OF THE FIFTH AND TENTH CIRCUITS AND THUS INVOLVES AN IMPORTANT QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT

SFTC makes no effective response to TASK's assertion of the intercircuit conflict created by the Second Circuit's decision.[1] The Fifth Circuit in *Byrd v. Corporacion Forestal y Industrial*, 182 F.3d 380, 391 (5th Cir. 1999) expressly rejected

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[1] In attempting to deny the intercircuit conflict, SFTC makes a significant misstatement. No where in TASK's original petition did TASK state that the Second Circuit "held that assignees have no right to sue under the FSIA." (Resp. Br. at 9) TASK, more accurately, stated:

> Just prior to holding that TASK had failed to establish that its action was based upon the "requisite U.S. Act," the Second Circuit expressed its doubt that any assigned or purchased judgment could qualify as being 'based upon the requisite U.S. Act of the assignor' for purposes of a §1605(a)(2) action (A 11):
>
> > [W]e need not determine today whether every assigned, or purchased, judgment fails to meet the statutory ["based upon"] requirement. It is enough for us to say that *any* assigned or purchased judgment is unlikely to qualify as [being] "based upon" *the requisite U.S. Act* of the assignor. . . ." (Emphasis added)

(Pet. at 22 quoting the decision at A 11)

Moreover, the Second Circuit never "held ," as asserted by SFTC, that TASK "could not rely on its *own* contractual dealings with VSL as a basis for asserting jurisdiction over SFTC." (Resp. Br. at 9) Quite to the contrary, the Second Circuit (A 8) agreed with the district court (A 43) that an analysis of the conduct underlying a judgment is appropriate when ruling on the district court's jurisdiction under the FSIA.

the defendants' argument therein that the plaintiffs "*only* entered into the scene as an assignee [which] renders the relationship indirect." (emphasis added) Like the unsuccessful defendants in *Byrd*, the Second Circuit herein also erroneously reasoned that "TASK now has a claim against SFTC *only* because the VSL liquidators chose to assign to TASK these judgments rather than some other assets that would have satisfied TASK's claim . . . against VSL." (A 10) [2]

Significantly, the *Byrd* Court took particular note that the defendants "foresaw and perhaps even helped to plan the financial harms which occurred to [the plaintiffs]." 182 F.3d at 391. Similarly herein, the Hong Kong proceedings confirmed that SFTC intentionally engaged in asset stripping and liquidated its agent VSL, which halted the arbitration proceedings and forced TASK to accept an assignment of the VSL judgments. Yet, despite SFTC's well documented scheme, (CAJA at A 127-132; 136; 140-143) the Second Circuit chose to deny TASK its day in court reasoning that TASK *only* had these claims by assignment.[3]

SFTC's attempted distinction of *Southway v. Central Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999) is no more valid

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[2] In making this erroneous assumption the Second Circuit ignored certain language in the Deed of Assignment partially quoted in note 6 of its decision (A 10), which states in reference to the liability of VSL under the contracts: "there are and/or will be insufficient funds to fully discharge the liability." (Court of Appeals Joint Appendix ("CAJA") at A 235) Thus, contrary to the Second Circuit's statement, how VSL's liquidators chose to pay TASK *was* directly related to the contracts and VSL's/SFTC's breach of them which had a direct effect in New York. (A10) Moreover, given that VSL had no other assets to satisfy TASK's claims, TASK was definitely *not* "indifferent to how this payment was to be accomplished." (*Id.*)

[3] Rather than strictly analyzing the actual facts, the Second Circuit focused instead upon hypotheticals involving theoretical payments by VSL to TASK of "pots of gold" and "bananas" which VSL "*might have* assigned to TASK." (A-10) (emphasis added) The decision also points to hypothetical judgments which VSL *might have* assigned to TASK which, if assigned, would have had "nothing to do with the United States." *Id.*

than its attempted distinction of *Byrd*. Respondent asserts that in *Byrd* and in *Southway*, there were acts which caused a direct effect in the United States which are allegedly absent herein. (Resp. Br. at 9-10) As discussed above, the district court found both the requisite act outside the United States and the direct effect in this country present. (A 40-42) The Second Circuit acknowledged the direct effect herein (A 7), but found no "requisite *U.S. Act.*" (A 11) Petitioner agrees that there was no U.S. Act, but respectfully disagrees that one is required under the third clause of this exception.

The decision of the Second Circuit poses a threat to the goal of uniformity of federal jurisdiction under the FSIA. If assignees are to be denied an equal right to bring actions under the third clause of the commercial activity exception, it should be a uniform denial across the nation sanctioned by this Court - not one which exists only in the Second Circuit.[4]

The potential confusion arising from the Second Circuit's erroneous jurisdictional analysis of the third clause of this most important exception to foreign sovereign immunity, along with the significant impact of the lower court's decision on the access of future FSIA litigants to the federal courts in the Second Circuit, warrants a full review of this decision by this Court.

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[4] Other circuits have recognized an assignee's right to enforce a cause of action arising under various federal statutes where the assignment agreement expressly includes the legal claim or cause of action. *See*, *Lerman v. Joyce International, Inc.*, 10 F.3d 106, 112-113 (3d Cir. 1993) (RICO claim); *Gulfstream III Assoc., Inc. v. Gulfstream Aerospace Corp. et al.*, 995 F.2d 425, 440 (3d Cir. 1993) (antitrust claim); *Texas Life, Accident, Health & Hospital Service Ins. Guaranty Assoc. v. Gaylord Entertainment Co.*, 105 F.3d 210, 218 (5th Cir. 1997) (ERISA breach of fiduciary duty claim).

The Deed of Assignment between VSL/Harlifax Ltd. and TASK expressly assigns "all judgments, causes of action . . . to TASK. . . ." (CAJA at A 236).

III. RESPONDENT DOES NOT ADDRESS THE INTRA-CIRCUIT CONFLICT CREATED BETWEEN THE SECOND CIRCUIT'S DECISION HEREIN AND ITS PRIOR DECISION IN *INTERNATIONAL HOUSING*

While the Second Circuit recognized that in *International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8 (2d Cir. 1989), the Court of Appeals examined the conduct underlying a foreign judgment to determine whether jurisdiction existed (A 8), it failed to reconcile the fact that there was no U.S. Act. required by the court's analysis there. The Second Circuit did not find subject matter jurisdiction in *International Housing*, a suit to enforce a default judgment entered in the Bahamas, simply because payment in New York City was not a contractual requirement. *Id.* at 11. Had the contract there called for payment to be made to a U.S. bank, the court would have found jurisdiction even though, as in *Weltover*, the only connection with the United States was that money which should have been paid to a U.S. bank failed to arrive here. Thus the Second Circuit's decision herein cannot be reconciled with its prior decision in *International Housing* and creates an intra-circuit conflict. While admittedly not as significant as that created by the decision's inconsistency with this Court's decision in *Weltover*, or the inconsistency of its reasoning with the decisions of the Fifth and Tenth Circuit Courts of Appeals as discussed above, this intracircuit conflict demonstrates still another reason why this petition should be granted.

IV. A GRANT OF CERTIORARI IS IN KEEPING WITH THIS COURT'S PRIME RESPONSIBILITY FOR THE PROPER FUNCTIONING OF THE FEDERAL JUDICIARY AND WILL DISCOURAGE FUTURE ATTEMPTS TO CIRCUMVENT THE FSIA.

The responsibility for the proper functioning of the federal judiciary rests upon the United States Supreme Court. Aside from its erroneous jurisdictional analysis of the third clause of §1605(a)(2), the Second Circuit's decision reflects an

express reluctance to determine a "sensitive question" which may have "significant impact on U.S. foreign relations" (A 8). Given that such a concern is more properly one for the legislature when it enacts statutory provisions, *see Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 828, 106 S.Ct. 3229, 3242 (1986), it is the duty of the courts to decide such questions in accordance with the legislative intent until the legislature modifies the existing law.

SFTC's attempt to defraud petitioner out of monies due it under the contracts is abundantly supported. Respondent has also admitted in ancillary court proceedings that this case is of utmost importance since it will guide the way it structures its future transactions. This concern was reflected in its initial brief to the Second Circuit wherein SFTC argued, despite the admitted principal-agent relationship with VSL, that each agent/instrumentality of a foreign government should be treated as a distinct foreign state. (SFTC Br. at 31-32) As stated by SFTC therein, "[a]ny other rule would cripple the ability of governments to set up corporate instrumentalities, by causing uncertainty as the liability of such instrumentalities. . . ." *Id.* at 32. It is thus clear that the facts herein are neither "unusual", "unique" nor "uncommon" as SFTC suggests. (Resp. Br. at 5, 10) It is respectfully submitted that if certiorari is not granted herein, it will encourage the use of temporary corporate agents to avoid liability for the private acts of sovereign governments. What happened here was *not* a first and will be repeated again and again absent a full review by this Court.

CONCLUSION

For all the foregoing reasons, as well as those raised in the original petition, this Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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